167-461

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~660~~. 301

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JULY 17, 1895.

(15,950.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	4	2
Assignment of errors	7	3
Answer to writ of error	14	6
Transcript from court of common pleas	14	6
Appearance docket entries	14	6
Settlement	15	7
Specifications of appeal	16	7
Appeal bond	20	9
Stipulation to try without a jury	22	11
Evidence in behalf of the Commonwealth	23	11
Testimony of Captain P. D. Bricker	24	11
Evidence in behalf of the defendant	24	12
Affidavit No. 1 of W. A. Shaw	26	13
Exhibit No. 1—Market value of banks	36	19
No. 2—Capital, surplus, and undivided profits of all State banks and trust companies in Pittsburgh	37	20
Affidavit No. 2 of W. A. Shaw	38	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1895.

	Original.	Print.
Exhibit A—Statement of national banks	42	24
Motion and order to file affidavit No. 3 of W. A. Shaw	44	26
Memorandum of State banks favored by taxing system	45	27
Affidavit No. 3 of W. A. Shaw	47	28
Request of defendant for findings of fact	50	29
Opinion of the court	59	34
Findings of fact	59	34
Conclusions	68	40
Exceptions to findings, conclusions, and opinion	69	40
Order on exceptions	77	45
Docket entries	79	46
Præcipe for certiorari	80	47
Appeal and affidavit	81	47
Bond on appeal	83	48
Writ of certiorari	84	48
Specifications of error	86	49
Opinion	90	52
Motion for re-argument	93	52
Order denying re-argument	94	54
Return to writ of error	95	54
Petition for writ of error	96	54
Bond on writ of error	101	56
Clerk's certificate	104	58

1 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of Pennsylvania for the middle district, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Pennsylvania for the middle district, before you or some of you, being the highest court of law and equity of the said State in which a decision could be had, which plea was the appeal of the Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., of May term, 1895, No. 8, to the said supreme court from the judgment of the court of common pleas of Dauphin county in a certain suit between The Commonwealth of Pennsylvania, plaintiff, and The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., defendant, wherein was drawn in question the validity of a statute of the Commonwealth of Pennsylvania and an authority exercised under the said Commonwealth, on the ground that they are repugnant to the Constitution and laws of the United States, and the decision of the said supreme court of Pennsylvania was in favor of the validity of the said statute, and there was also claimed a right or privilege under a statute and the Constitution of the United States, and the decision of the courts of Pennsylvania was against the right or privilege specially set up or claimed under the Constitution and a statute of the United States, a manifest error hath happened, to the great damage of the said Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., as by their complaint appears—

2 We, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the customs and laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Philadelphia, this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-five, in the one hundred and nineteenth year of the Independence of the United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of the United States Circuit Court,
Eastern District of Pennsylvania.

3 [Endorsed:] No. 8. May T., *term*, 1895 (S. C. Pa., M. D.). Com. of Pennsylvania *vs.* Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., appellant. Writ of error. Writ of error allowed by me this 12th day of June, 1895. James P. Sterrett, chief justice sup. court of Penna. Filed in supreme court, middle district, Jun- 14, 1895.

4 Original.

Citation.

The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., is plaintiff in error and The Commonwealth of Pennsylvania is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James P. Sterrett, chief justice of the supreme court of Pennsylvania, this twelfth day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES P. STERRETT,
Chief Justice Sup. Court of Pennsylvania.

Affidavit of Service of Citation.

—— ——, being duly sworn, deposes and says that he served the within citation upon the defendant in error by reading the same to the Honorable Daniel H. Hastings, gove-nor of the State of Pennsylvania, and the Honorable H. C. McCormick, attorney gen-
5 eral, and by handing to each of them a true copy thereof on the — day of June, 1895.

—— ——.

Sworn and acknowledged this — day of June, 1895.

—— ——.

6 [Endorsed:] Original. No. 8. May T., 1895 (S. C., M. D.). Com. of Pennsylvania *vs.* Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., appellant. Citation. And now, June 20, 1895, service of the within citation accepted for Com. of Pa. Jno. S. Elkin, dep'y att'y gen'l. Filed in sup. ct. June 20th. John Wilson, att'y-at-law, Pittsburgh, Pa.

7 In the Supreme Court of the United States of America.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF Pittsburgh, Pa., Plaintiff in Error, Defendant in the Court Below,

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error, Plaintiff in the Court Below.

Assignment of Errors.

Now comes The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., plaintiff in error, by its attorneys, and makes the following assignment of errors in the Supreme Court of the United States in the above-entitled cause, which has been removed from the supreme court of the State of Pennsylvania to the Supreme Court of the United States by writ of error, and the plaintiff in error alleges that there is manifest error in the records and proceedings of the said supreme court of the State of Pennsylvania in the following particulars, to wit:

First. That by the record aforesaid it appears that the judgment in the above-entitled case was given for the said Commonwealth of Pennsylvania and against the said Merchants' and Manufacturers' National Bank of Pittsburgh, whereas by the law of the land the said judgment ought to have been given for the said Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., and against the said Commonwealth of Pennsylvania.

8 Second. That by the record aforesaid it appears that the judgment of the court of common pleas of Dauphin county, by which the appeal to the said court of the Merchants' and Manufacturers' National bank was dismissed and judgment directed to be entered against the said Merchants' and Manufacturers' National bank in the sum of four thousand seven hundred and sixty-nine dollars and forty-six cents ($4,769.46), was affirmed by the supreme court of the State of Pennsylvania, whereas by the law of the land the said judgment of the said court of common pleas of Dauphin county ought to have been reversed and the appeal of the said Merchants' and Manufacturers' National bank ought to have been sustained.

Third. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the second specification of error, whereas the said supreme court of Pennsylvania ought to have sustained the same.

The said second specification of error was as to the refusal of the court of common pleas of Dauphin county to make (on request) a specific finding of fact, to wit, that of nine designated national banks in the city of Pittsburgh. If they had paid a State tax for the year 1893 at the same rate the defendant was assessed—

The Farmers' Deposit National bank would have paid to the State a tax of $8,700 instead of $2,400.

The German National bank would have paid $3,050 instead of $2,000.

The Union National bank would have paid $5,000 instead of $2,000.

The Tradesmen's National bank would have paid $4,240 instead of $3,200.

The First National Bank of Birmingham, Pittsburgh, would have paid $1,200 instead of $800.

The Second National Bank of Pittsburgh would have paid $3,540 instead of $2,400.

The Diamond National Bank of Pittsburgh would have paid $1,760 instead of $1,600.

The Pittsburgh National Bank of Commerce would have paid $6,000 instead of $3,000.

The Mechanics' National Bank of Pittsburgh would have paid $4,400 instead of $4,000, and the entire list of fifty-five national banks and twelve State banks aforesaid would have paid upwards of $50,000 more in taxes to the Commonwealth than they did pay.

9 Fourth. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the third specification of error, whereas the said court ought to have sustained the same.

The said third specification of error was as to the refusal of the court of common pleas of Dauphin county to make (on request) a specific finding of fact, as follows:

"That the act of June 8, 1891, sections 6 and 7, authorized the taxation of shares of stock of different national banks in the Commonwealth for the year 1893 and thereafter at different rates, allowed different times for the payment of said tax, exempted certain banks from local tax and did not exempt others, provided diverse methods for valuing the shares of stock of members of the same class, to wit, national banks, and authorized a tax in the case of some national banks of eight mills on each dollar of the par value of the shares 'subscribed or issued,' and in the case of other national banks of four mills only on the actual value of all the shares 'issued,' and that the act, as a matter of fact, in the latter class allowed shares of stock 'subscribed' but not 'issued' to be exempt from taxation."

Fifth. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the fourth specification of error, whereas the said court ought to have sustained the same.

The said fourth specification of error was as to the refusal of the court below (on request) to make a specific finding, to wit:

"That the tax appealed from is made a lien upon the franchise and real and personal property of the bank by section 31 of the act of June 1, 1889, P. L. 437, and that the Commonwealth seeks to collect the said tax as a tax on the 'actual value of the capital stock issued,' and not as a tax 'on the shares of stock as the personal property of the shareholders.'"

10 Sixth. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the fifth specifica-

tion of error, whereas the said court ought to have sustained the same.

The said fifth specification of error was as to a material conclusion of law of the learned judge of the court below, to wit, that for the purposes of this case in the taxation of the shares of a national bank—

"The corporation and the shareholders as well as the capital stock and the shares of stock are practically the same."

Seventh. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the sixth specification of error, whereas the said court ought to have sustained the same.

The said sixth specification of error was as to the first conclusion of law of the court below, to wit:

"That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article 9, section 1, of the Constitution of the State of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'"

Eighth. That by the record aforesaid it appears that the assessment by the auditor general and treasurer of Pennsylvania of a tax against the Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., under the Pennsylvania system, at a greater rate upon the actual value of the shares of stock than the tax assessed against and collected from many other designated national and State banks of the State of Pennsylvania, was not in violation of section 5219 of the Revised Statutes of the United States, and therefore not
11 illegal, whereas the said court ought to have decided that the assessment was in violation of section 5219 of the Revised Statutes of the United States, being "at a greater rate than is assessed against other moneyed capital in the hands of individual citizens of the State," and therefore void and of no effect.

Ninth. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the eighth specification of error, whereas the said court ought to have sustained the same.

The said eighth specification of error was as to the third conclusion of law of the court below, to wit:

"That the taxation upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice and not in conflict with art. XIV, § 1, cl. 3, of the amendments to the Constitution of the United States, which (*inter alia*) forbids any State to deprive any person of property without 'due process of law.'"

Tenth. That by the record aforesaid it appears that the supreme court of Pennsylvania dismissed the ninth specification of error, whereas the said court ought to have sustained the same.

The said ninth specification of error was as to the fourth conclusion of law of the court below, to wit:

"That said taxing act is not in conflict with amendment 14 of the Constitution of the United States, section 1, which (*inter alia*)

ordains as follows: 'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'"

Wherefore the plaintiff in error prays the honorable Supreme Court of the United States that the judgment of the said supreme court of the State of Pennsylvania in the above-entitled cause may be reversed, and that judgment may be entered in favor of the said plaintiff in error.

SCOTT & GORDON,
WM. M. HALL, JR.,
JOHN WILSON,
Att'ys for Plaintiff in Error.

[Endorsed:] In the Supreme Court of the United States. The Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., plaintiff in error, *vs.* The Commonwealth of Pennsylvania, defendant in error. Filed in supreme court, middle district, Jul- 8, 1895. Assignment of errors. Scott & Gordon, Wm. M. Hall, Jr., John Wilson, pl't'ff's att'ys, Pittsburgh, Pa.

The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance Docket Entries.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 669, Jan. term, 1894, is contained the following:

Copy of Appearance Docket Entry.

COMMONWEALTH OF PENNSYLVANIA *vs.* MERCHANTS' & MANUFACTURERS' NATIONAL BANK.	669. Appeal from the Settlement of the Auditor General and State Treasurer.

Hensel, Jno. Wilson, W. M. Hall, Scott & Gordon.

Jan. 2d, 1894.—Appeal and specifications of objections filed.
Jan. 3d, 1894.—Bond filed.
Jan. 20th, 1894.—Stipulations to try without jury filed.
Jan. 20th, 1894.—On motion filed, leave granted to file supplementary affidavits.
June 20th, 1894.—Affidavits of W. A. Shaw, findings of facts, and testimony filed.
June 20th, 1894.—Affidavit No. 3 of W. A. Shaw filed.
Oct. 23d, 1894.—Opinion and findings of the court filed, deciding that there is due the Commonwealth by the defendant the sum of four thousand seven hundred and sixty-nine and $\frac{46}{100}$ dollars ($4,769.46) and costs.
Nov. 13, 1894.—Defendant's exceptions filed.

Dec. 1st, 1894.—Opinion on exceptions filed and judgment in accordance with the opinion heretofore filed. Same day, exceptions sealed for defendant.

Dec. 13th, 1894.—Certiorari surappeal No. 8, May term, 1895, from Supreme Court received and filed.

Certified:

[Seal of the Court of Common Pleas of Dauphin County.]

JOHN P. MELICK, *Prothonotary.*

15 *Settlement.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNA.
vs.
THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PENNA.

No. 669. January Term, 1894. Tax on Capital Stock.

Settlement.

Merchants' and Manufacturers' National Bank, Pittsburgh, Pa., in account with the Commonwealth of Pennsylvania, Dr.

For tax for year 1893 on actual value of shares of capital stock issued as per report made by said bank, and the following statement of valuation and assessment made by the auditor general, in pursuance of the provisions of the 26th section, act of June 8th, 1891:

To settlement of August 18, 1893, superseded	$4,480 00
Whole No. of shares of stock issued, 16,000.	
Actual value of each share, $65.00.	
Actual value of capital stock issued, $1,040,000. Tax @ 4 mills	4,160 00
	$8,640 00
CR.	
By settlement of August 18th, 1893, superseded as per supplemental report filed herewith	4,480 00
	$4,160 00

16 AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Nov.* 1, 1893.

Settled and entered.

P. D. BRICKER,
For D. McM. GREGG,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *Nov.* 1, 1893.

Approved.

H. C. GREENEWALT,
For JOHN W. MORRISON,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *December 11th*, 1893.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office, the day and year aforesaid.

D. McM. GREGG,
Auditor General.

Specifications of Appeal.

In the matter of the account for the State tax on the shares of stock for the year 1893, amounting to $4,160.00, settled against the Merchants' and Manufacturers' National bank by the auditor general of Pennsylvania upon the first day of November, 1893, and approved by the State treasurer on the first day of November, 1893, a copy of said account being hereto attached.

The said Merchants' and Manufacturers' National Bank hereby appeals from the said settlement of account to the court of
17 common pleas of Dauphin county, and files the following specifications of objection thereto, agreeably to the provisions of the act of assembly in such case made and provided:

1. The legislation, to wit, sections 6 and 7 of the act of June 8, 1891, P. L. 240 *et seq.* under which the State taxes of national banks of the Commonwealth of Pennsylvania are assessed and collected, and under which the aforesaid settlement is made, violates article IX, section 1 of the constitution of the Commonwealth in this:

(*a*) That while this appellant is assessed four mills on each dollar of the actual value of its shares, numerous other national banks in competition with this appellant in Pittsburgh and elsewhere in the State are allowed to pay much less than four mills on each dollar of the actual value of their shares.

(*b*) That the system under which the tax aforesaid is levied lacks uniformity in application to the various members of the same class, to wit, national banks—

1. In the rate levied.
2. In the time of payment of the tax.
3. In the exemption of certain members of the class from local taxation and not exempting others.
4. In the diverse methods of valuation of the shares of different national banks.

The applicant is advised, believes, and avers that the said system under which the settlement aforesaid is made is therefore unconstitutional, null and void.

2. That the settlement aforesaid and the results of the said system of taxation embodied in said sections 6 and 7 of the
18 said act defeat the avowed purpose and intent of the said act, which in the preamble thereof is alleged to be "to bring about the equalization of taxation."

3. That the said settlement is in violation of the Federal statutes relative to the taxation of the shares of national banks by the States,

to wit, the act of Congress of 3 June, 1864, c. 106, s. 41, v. 13, p. 112, of the United States Statutes at Large, as modified by the act of Congress of 10 Feb., 1868, c. 7, v. 15, p. 34, of the United States Statutes at Large, which statutes in their present form and application are found as section 5219 of the Revised Statutes of the United States, 2d edition, 1878, at page 1009, in this—that the said "taxation is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this Commonwealth," and the said legislation under which the settlement is made is therefore null and void.

4. That the Commonwealth in seeking to collect this tax from the appellant under section 7th of the act of June 8, 1891, a tax which under the said Federal statute must be levied on the "shares of stock as the personal property of the shareholder," and in providing no means of notice to the shareholders of the stock, is an attempt to take property without "due process of law" and violates the amendment of Constitution of the United States, art. XIV, sec. 1, which in part is as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law," and the said section "7th is, therefore, null and void."

5. That in providing for the taxation of the shares of national banks within the Commonwealth without reference to a common ratio, and in allowing different banks to pay taxes on their
19 property of the same kind, similarly situated at different rates, the said sections 6 and 7 of the act of June 8, 1891, violate amendment XIV of the Constitution of the United States, section 1, which in part is as follows:

"Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws," and the said sections 6 and 7 are therefore null and void.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK,
By JOHN WILSON,
WM. M. HALL, JR.,
SCOTT & GORDON, *Counsel for Appellant.*

(Endorsement on appeal and settlement:) No. 669. Jan. term, 1894. Commonwealth of Pa. *vs.* Merchants' and Manufacturers' National Bank. Filed Jan. 2, 1894. Specifications of appeal of bank from settlement of account by the auditor general. Filed in the auditor general's office 28 day of Dec., 1893. Signed P. D. Bricker for D. M. M. Gregg, auditor general.

20 *Appeal Bond.*

Know all men by these presents that we, The Merchants' and Manufacturers' National Bank, of Pittsburgh, Pennsylvania, a corporation, and W. A. Shaw & E. M. Ferguson, of the same place, are held and firmly bound to the Commonwealth of Pennsylvania in

the sum of ten thousand three hundred and twenty dollars ($10,320), lawful money of the United States, to be paid to the said Commonwealth; to which payment, well and truly to be made, we do bind ourselves and each of us and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

In witness whereof the said Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., in pursuance of a resolution of its board of directors, has caused its common and corporate seal to be hereto affixed by its cashier, and the said W. A. Shaw and E. M. Ferguson have hereunto affixed their hands and seals the 28th day of December, A. D. 1893.

Whereas the above-bounden Merchants' and Manufacturers' National bank has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on shares, amounting to $4,160, made by the auditor general on November 1st, 1893, and approved by the State treasurer on Nov. 1st, 1893:

Now, the condition of this obligation is such that if the said Merchants' and Manufacturers' National bank shall prosecute the said appeal with effect and pay all costs or charges which the courts having jurisdiction to hear and determine said appeal shall
21 award, and also pay any sum of money which shall appear by the judgment of the courts to be due upon said account to the Commonwealth of Penna., then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

[Seal of M. & M. Nat. Bank.]

MER. & MFRS.' NATIONAL BANK,
PITTSBURGH, PA.,
By W. A. SHAW, *Its Cashier.*
W. A. SHAW. [SEAL.]
E. M. FERGUSON. [SEAL.]

Security of the above bond is approved.
Dec. 29th, 1893.

S. A. McCLUNG,
Judge of the Court of Common Pleas, No. 3,
of Allegheny County.

(Endorsed:) No. 669. Jan. term, 1894. Bond of appellant. Com. of Pa. *vs.* Merchants' & Manufacturers' National Bank. Jan. 3, 1894. The security of the within bond approved by the court. J. W. Simonton, P. J. Filed Jan. 3, '94. John Wilson. Wm. Hall, Jr.

22 In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH.
} No. 669. January Term, 1894.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court, to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

June 20th, 1894.

JAS. A. STRANAHAN,
Deputy Attorney General.
JOHN WILSON,
WM. M. HALL, JR.,
Attorneys for the Merchants' & Manufacturers' National Bank of Pittsburgh.

Endorsement: No. 669. January term, 1894. Commonwealth *vs.* The Merchants' and Manufacturers' National Bank of Pittsburgh. Stipulation to try without jury. Filed June 20th, 1894.

23 (TESTIMONY.)

Evidence in Behalf of Commonwealth.

Appearances—For the Commonwealth: Hon. W. U. Hensel, attorney general, and Hon. J. A. Stranahan, deputy attorney general. For the defendant: John Wilson, Esq.; Wm. M. Hall, Jr., Esq.

Tried before Hon. J. W. Simonton, P. J., and Hon. J. B. McPherson, A. L. J., at Harrisburg, Pa., Wednesday, June 20th, 1894 (without a jury).

24 Capt. P. D. BRICKER, called by the Commonwealth and sworn.

Examined by Mr. STRANAHAN:

Q. Capt. Bricker, you are the corporation clerk of the auditor general's office?

A. Yes, sir.

Q. You can state if the Merchants' and Manufacturers' National Bank of Pittsburgh made a report to your department.

A. The bank made a report to the auditor general's office on the 18th day of August, 1893. The account was settled against the bank for the amount of tax, $4,480, on the same day, August 18, 1893. A supplemental report was filed October 30, 1893, correcting the former report, upon which a settlement was made November 1, 1893, of $4,160, from which last settlement, on December 28, 1893, an appeal was taken to this court.

Mr. STRANAHAN: This settlement and these reports we offer in evidence.

Commonwealth rests.

Evidence in Behalf of Defendant.

Mr. WILSON: In behalf of the defendant we offer our specifications of appeal, and, with your honors' permission, I will state briefly on what we base our appeal, which I shall afterwards hope to have the opportunity to take up more fully on the argument of the case before your honors.

25 Our appeal is based upon what we allege to be the unconstitutionality of the law. We aver that this settlement, producing the results which it does in our case and in other cases—which we will show to your honors by the affidavits which we shall submit—results in a lack of uniformity of taxation upon the same class of subjects, to wit: the shares of stock of national banks within the State of Pennsylvania.

Secondly. That in our case this settlement violates the act of Congress of 1864 and of 1868 regulating the taxation of shares of stock of national banks in this, that it levies upon us a tax at a greater rate than is levied upon other moneyed capital in the hands of individual citizens of the State, that moneyed capital being invested in the shares of stock of other national and State banks in competition with us.

We aver in the third place in our specifications of appeal that the Federal statute, being section 5219 in the Revised Statutes of the United States, directs that the State shall assess the shares of stock of national banks as the "personal property of the shareholders" thereof; and the fourteenth amendment of the Constitution of the United States directs that property shall be taken only by "due process of law." This tax is assessed against the bank itself, and the 31st section of the act of 1889 makes the tax a lien on the franchise, or the property of the bank; the shares of stock as the property of the individual property-owners or shareholders are lost sight of entirely, no notice whatever of the assessment is given to the shareholder, or prescribed by the act. We therefore aver that, inasmuch as the Federal statute shuts up the State to the one method of the collection of this tax, namely, as a tax to be levied upon the shareholder, that as a matter of fact the tax is levied against the

26 bank, the shareholder has no notice of it, and that therefore is taking of property without "due process of law."

We aver in the next place that because of the lack of uniformity and of the gross inequalities in the taxation of shares of national banks which results from this system, that the fourteenth amendment of the Constitution of the United States is violated in this, that there is denied to the shareholders of national banks, as evidenced in our case, the "equal protection of the laws."

Mr. WILSON: I offer in evidence the specifications of appeal. I will also offer in evidence, by your honors' permission, these affidavits, which we will have marked for the purpose of identification.

Affidavit No. 1 of W. A. Shaw.

DAUPHIN COUNTY, *ss:*

Be it remembered that on the 20th day of June, A. D. 1894, before me, the subscriber, the prothonotary of the court of common pleas in and for said county, personally appeared W. A. Shaw, of full age, who, being duly sworn according to law, doth depose and say that he is the cashier of The Merchants' and Manufacturers' National Bank, of Pittsburgh, Pa., the appellant corporation, and has been for many years, and that he has taken great labor and pains to inform himself as to the facts and matters herein set forth, and believes and avers that the statistics given in this, his solemn affidavit, are true and correct.

The amounts paid by the respective national banks in the
27 city of Pittsburgh herein referred to as State tax for 1893 have been taken from the report of the auditor general of the Commonwealth for 1893.

The capital stock, surplus funds and undivided profits of the respective banks have been taken in this affidavit from the sworn reports of the cashiers of the said banks to the Controller of the Currency, under date of March 6, 1893, the time at or about which such taxes were paid.

The computation of the "book value" of the shares of stock of the respective banks have been derived from an addition together of the capital stock, surplus fund and undivided profits of each bank respectively, and the division of the gross sum so derived by the total number of shares of stock of the respective banks.

The statement of the actual value of the shares of stock of the respective banks herein referred to has been based upon the actual sale of such stock as near as possible prior to March 1, 1893, or in such cases as there have been no sales upon the offers made for such stocks upon the stock exchange of the city of Pittsburgh and the current quotations of the value of the same.

On March 1, 1893, on or before which date the commuting national banks paid their tax to the Commonwealth, there were in the city of Pittsburgh twenty-seven national banks. Of these twelve elected to pay in commutation of all other taxation, except a local tax on their real estate under the law, a tax to the Commonwealth of eight mills upon the par value of their capital stock. These banks were:

1. Farmers' Deposit National bank.
2. German National bank.
3. Union National bank.
4. Tradesmen's National bank.
5. First National Bank of Birmingham, Pittsburgh.
6. Second National bank.
28 7. Diamond National bank.
8. Pittsburgh National Bank of Commerce.
9. Mechanics' National bank.

10. Iron City National bank.
11. Duquesne National bank.
12. Fort Pitt National bank.

Of these banks the Iron City National, Fort Pitt National and Duquesne National paid a tax at the rate of slightly more than four mills upon each dollar of the actual value of their shares of stock at the said time, March 1, 1893, and so escaped under the law other taxation except upon the real estate. The other nine national banks, in comparison with the appellant bank which has been assessed four mills upon each dollar of the actual value of its shares, have paid for 1893 tax to the State in the amounts and at the rates following, as shown by these computations.

(*a*) The Farmers' Deposit National Bank of Pittsburgh, as shown by the records of the auditor general's office, paid a tax to the State of $2,400, and thereby escaped local taxation except upon its real estate.

This bank at the time of the payment of the said tax had a—

Capital stock	$300,000
Surplus fund	1,000,000
Undivided profits	31,853
Total value of its taxable property	$1,331,853

As shown by its sworn report to the Controller of the Currency of the date of March 6, 1893.

The total value of this appellant's taxable property at the same date, March 6, 1893 (consisting of capital stock, $800,000, surplus fund, $275,000, and undivided profits, $51,329), was $1,126,329.

29 The Farmers' Deposit National bank aforesaid has, by the act of assembly aforesaid, paid a tax of $2,400 to the State on $1,331,853, and thereby has escaped all local taxation as well, except local taxation upon its real estate, while this appellant has been assessed $4,160 on $1.126,329 as a State tax, and is not exempt from local taxation. On what is known by bankers as the "book value" of its shares of stock predicated upon the sum total of its capital stock, surplus fund and undivided profits, divided by the total number of its shares, the said Farmers' Deposit National bank has paid a tax of $1\frac{80}{100}$ mills on each dollar thereof, while this appellant has been assessed a tax of $3\frac{69}{100}$ mills upon each dollar of the "book value" of its shares. The "book value" so called of the shares of stock of the Farmers' Deposit National bank at the said time was about $448, while the market or actual value thereof was $725 for each share of a par value of $100, on which value the tax paid to the State was less than $1\frac{3}{10}$ mills, while this appellant is assessed four mills upon each dollar of the actual value of its shares of stock. Taxed at the rate the appellant is taxed, the Farmers' Deposit National bank would have paid to the State a tax of $8,700, instead of $2,400.

(*b*) The German National Bank of Pittsburgh, in competition with this appellant, paid, as shown by the records of the auditor general's office, into the State treasury, on or before March 1, 1893,

a tax of $2,000, being eight mills upon each dollar of the par value of its stock, and under the act of assembly aforesaid thereby escaped all other taxation except the local taxation upon its real estate.

At the time of the said payment this bank had, as shown by its report to the Controller of the Currency of March 6, 1893:

30	Capital stock	$250,000
	Surplus fund	500,000
	Undivided profits	60,830
		$810,830

This bank, therefore, has paid to the Commonwealth for 1893 $2,000 as a tax on property worth $810,830, or about $2\frac{38}{100}$ mills on each dollar of the book value thereof.

The market or actual value of the shares of this stock at the time said tax was paid was $305 on each share of the par value of $100, and this bank, therefore, paid only a tax of $2\frac{62}{100}$ mills on the actual value thereof. Taxed at the rate the appellant is taxed, the bank would have paid $3,050 instead of $2,000.

(*c*) The Union National Bank of Pittsburgh has paid to the State in full for taxes of 1893 the sum of $2,000, and thereby escaped all other taxation except on its real estate.

This bank at the said time had a—

Capital stock	$250,000
Surplus fund	700,000
Undivided profits	49,376
Total value of taxable property	$999,376

This bank pays to the Commonwealth a tax of about two mills on each dollar of the book value of the taxable property thereof.

The market or actual value of its shares at the time said tax was paid was $500 on a par value of $100 per share, and on each dollar of the actual value thereof it paid a tax of $1\frac{6}{10}$ mills. Taxed at the rate at which the appellant is taxed, this bank would have paid $5,000 instead of $2,000.

31 (*d*) The Tradesmen's National Bank of Pittsburgh paid to the Commonwealth in full of all taxes for 1893 the sum of $3,200, and thereby escaped all taxation upon the shares thereof, except a local tax on its real estate.

This bank had at the said time—

Capital stock	$400,000
Surplus fund	500,000
Undivided profits	29,925
Total value of taxable property	$929,925

This bank paid to the Commonwealth a tax of about $3\frac{4}{10}$ mills on the book value of its taxable property or the book value of its shares.

The actual or market value thereof was $240 per share of a par value of $100, on which it paid a tax of $3\frac{3}{10}$ mills on each dollar of the actual value thereof. Taxed at the rate the appellant is taxed, this bank would have paid $4,240 instead of $3,200.

(*e*) The First National Bank of Birmingham, Pittsburgh, paid in full for taxes of 1893 $800.

This bank had—

Capital stock	$100,000
Surplus fund	100,000
Undivided profits	72,209
Total value of taxable property	$272,201

at the time when the said tax was paid.

A tax of $800 thereon is a tax of about three mills upon each dollar of the book value of the shares of said bank.

The actual or market value thereof was $300 on each share of stock of a par value of $100. On each dollar of the actual
32 value, therefore, the bank paid $2\frac{6}{10}$ mills in commutation of all other taxes. Taxed at the rate the appellant was taxed, this bank would have paid $1,200 instead of $800.

(*f*) Besides the banks aforesaid, the Second National Bank of Pittsburgh—

Capital stock	$300,000
Surplus fund	300,000
Undivided profits	107,729
Total	$707,291

has been allowed to pay a tax of only $2\frac{7}{10}$ mills upon each dollar of the actual value of its shares of stock, which were worth at the said time $295, of a par value of $100 per share, the same being a tax of $3\frac{3}{10}$ upon the "book value" of the said shares. Taxed at the rate at which appellant is taxed, this bank would have paid $3,540 instead of $2,400.

(*g*) The Diamond National Bank of Pittsburgh—

Capital stock	$200,000
Surplus fund	175,000
Undivided profits	31,401
Total	$406,401

has been allowed to pay a tax of only $3\frac{6}{10}$ mills upon each dollar of the actual value of its shares of stock, which were worth in the market at the time said tax was paid $220 per share, of a par value of $100. Taxed at the rate at which the appellant is taxed, this bank would have paid $1,760 instead of $1,600.

33 (*h*) The Pittsburgh National Bank of Commerce—

Capital stock	$500,000
Surplus	550,000
Undivided profits	41,074
Total	$1,091,074

has been allowed to pay $4,000, a tax of only $2\frac{6}{10}$ mills upon each dollar of the actual value of its shares of stock, which were worth in the market at the time said tax was paid $300 per share of a par value of $100. Taxed at the rate at which the appellant is taxed, this bank would have paid $6,000 instead of $4,000.

(*i*) The Mechanics' National Bank of Pittsburgh—

Capital stock	$500,000
Surplus	300,000
Undivided profits	160,128
Total	$960,128

has been allowed to pay $4,000, a tax of only $3\frac{5}{10}$ mills upon each dollar of the actual value of its shares of stock, which were worth in the market $110 per share at the time such tax was paid, the shares being of a par value of $50. Taxed at the rate at which the appellant is taxed, the bank would have paid $4,400 instead of $4,000.

The aggregate capital, surplus fund and undivided profits of the said nine national banks of said city of Pittsburgh, all paying a less tax than four mills upon the actual value of their shares of stock, was at the time the said tax was paid, as shown by their reports to the Controller of the Currency March 6, 1893, as follows:

34 Banks.	Capital.	Surplus and undivided profits.
Diamond National bank	$200,000	$206,410
Farmers' Deposit bank	300,000	1,031,853
First National Bank of Birmingham	100,000	172,201
Pittsburgh National Bank of Commerce	500,000	591,074
Mechanics' National bank	500,000	460,128
Union National bank	250,000	749,376
German National bank	250,000	560,830
Tradesmen's National bank	400,000	529,925
Second National bank	300,000	407,291
Totals	$2,800,000	$4,709,088
Sum total		7,509,088

The aggregate of capital stock, surplus fund and undivided profits of all the national banks in the city of Pittsburgh at the said date is shown in the annexed table:

Banks.	Capital.	Surplus and undivided profits.
First National	$750,000	$345,254
Second National	300,000	407,291
Third National	500,000	220,803
Fourth National	300,000	105,938
Fifth National	100,000	26,748
Allegheny National	500,000	255,512
Citizens' National	800,000	274,589
Commercial National	300,000	30,970
Diamond National	200,000	206,410
Duquesne National	200,000	137,312
Exchange National	1,200,000	504,886
Farmers' Deposit National	300,000	1,031,853
First National Bank of Birmingham	100,000	172,201
Fort Pitt National	200,000	174,702
German National	250,000	560,830
Iron City National	400,000	268,348
Liberty National	200,000	27,084
Marine National	300,000	30,128
Mechanics' National	500,000	460,128
Merchants' and Manufacturers' National	800,000	326,329
Metropolitan National	200,000	55,461
Monongahela National	250,000	71,187
Pennsylvania National	200,000	44,510
People's National	1,000,000	684,652
Pittsburgh National Bank of Commerce	500,000	591,074
Tradesmen's National	400,000	529,925
Union National	250,000	749,376
Totals	$11,000,000	$8,293,501

Total banking capital, surplus and undivided profits of na-
35 tional banks, $19,293,501, March 6, 1893; of the 26 national banks in competition with the appellant bank, nine having taxable property aggregating $7,509,088 were taxed at a less rate than the appellant bank, and of the banking capital of the national banks of the city of Pittsburgh $\frac{15}{19}$, approximately is taxed at a less rate on its actual value under the Pennsylvania system of taxation than this appellant's shares are taxed.

The actual or market value of the shares of stock of the said nine national banks was on March 6, 1893, approximately $9,427,500, all of which is taxed at a much less rate than the shares of stock of the appellant bank. The total actual or market value of all the shares of

stock of all the national banks in the city of Pittsburgh at the same date was $21,381,875. (See Exhibit No. 1.)

Affiant avers that if S. 5219 of the Revised Statutes of the United States forbids the taxing by the Commonwealth of shares of stock of national banks at a higher rate than the shares of stock of State banks, that the aggregate capital, undivided profits and surplus of all the State banks and trust companies of Pittsburgh is about the same in amount as the aggregate capital, undivided profits and surplus of the said nine commuting banks, and the actual aggregate market value of the shares of stock of the said nine banks is considerably in excess of the actual aggregate market value of the shares of stock of all the State banks and trust companies combined in the city of Pittsburgh.

The affiant believes the following table (see Exhibit 2), relative to the condition of State banks and trust companies in the city of Pittsburgh May 31, 1894, to be correct. Their resources for the year 1893, affiant avers, were slightly less.

Affiant further avers that the said nine national banks come much more closely in competition with the appellant bank than do
36 the trust companies and State banks of the city of Pittsburgh, and that appellant is much more adversely affected by the system of taxation discriminating in favor of the said nine national banks than it would be by a system of taxation discriminating in favor of the said State banks and trust companies.

W. A. SHAW.

Sworn to and subscribed this 20th day of June, A. D. 1894.

JOHN P. MELICK,
Prothonotary.

EXHIBIT No. 1.

Market value of following banks.	Capital stock.
Allegheny National @ $129	$645,000
Commercial National @ $98	294,000
Citizens' National @ $120	960,000
Diamond National @ $220	440,000
Duquesne National @ $187.50	375,000
Exchange National @ $158.50	1,914,000
Farmers' Deposit National @ $725	2,175,000
First National @ $175	1,312,500
Fourth National @ $125	375,000
Fifth National @ $125	125,000
Fort Pitt National @ $200	400,000
First National, Birmingham @ $300	300,000
German National @ $305	762,500
Iron City National @ $160	640,000
Liberty National @ $120	240,000
Marine National @ $98	294,000
Merchants' and Manufacturers' National @ $128	1,024,000
Mechanics' National @ $220	1,100,000
Metropolitan National @ $112	224,000
Monongahela National @ $140.75	351,845
People's National @ $202	2,020,000

Pittsburgh National Bank of Commerce @ *at* $300....	1,500,000
Pennsylvania National * (no sales), par.....	200,000
Second National @ $295.....	885,000
Third National @ $123.....	615,000
Tradesmen's National @ $240.....	960,000
Union National @ $500.....	1,250,000
Total.....	$21,381,875

37 EXHIBIT No. 2.

Capital, surplus, and undivided profits of all State banks and trust companies in the city of Pittsburgh.	Capital.	Surplus.	Undivided profits.
Anchor.....	$50,000	$14,494	$486
Arsenal	55,000	42,500	5,190
Bank of Pittsburgh	1,165,150	621,956	11,007
Bank of Secured Savings	50,000	.....	.....
City Deposit	64,100	63,000	2,003
City Savings	100,000	50,000	13,324
Fidelity Title and Trust Company.....	1,000,000	.....	242,853
Fifth Avenue	100,000	5,000	2,541
Freehold	200,000	250,000	14,077
German Savings and Deposit.	100,000	100,000	112,263
Germania Savings	150,000	30,000	24,073
Iron and Glass Dollar Savings.	100,000	50,000	48,153
Keystone	300,000	100,000	26,115
Manufacturers'	100,000	50,000	2,657
Mercantile.....	57,305	.....	1,468
Mercantile Trust Company...	258,930	18,756	9,577
Odd Fellows' Savings.....	100,000	.....	8,574
People's Savings.....	300,000	100,000	74,163
Pittsburgh Bank for Savings.	75,000	75,000	71,077
Pittsburgh Trust Company ..	600,000	.....	44,839
Safe Deposit and Trust Co. of Pittsburgh..... ..	500,000	60,000	16,563
The Union Trust Company ..	245,450	.....	34,429
West End Savings	62,600	40,000	2,651
Dollar Savings	.....	792,773	301,377
	$5,639,340	$2,431,450	$1,069,460
Totals, Feb. 28, 1894 ..	$5,733,535	$2,463,479	$950,671
Totals, Nov. 29, 1893..	5,708,520	2,465,818	1,098,136
Totals, June 7, 1893...	5,440,710	2,403,082	819,602

38 *Affidavit No. 2 of W. A. Shaw.*

DAUPHIN COUNTY, *ss:*

On this 20th day of June, 1894, before me the prothonotary for the court of common pleas of the said county, personally appeared W. A. Shaw, who being by me duly sworn according to law, did depose and say that he is cashier of The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., the defendants in the above-entitled suit, and has been for several years last past; that he has taken pains to inform himself as to the facts and matters herein set forth and believes and avers that the statistics given in the tables annexed as Exhibit A, and in this his solemn affidavit as to national banks of the State of Pennsylvania are substantially true and correct.

The amounts paid by the respective national banks of the State of Pennsylvania, as State tax for 1893, shown in the tables hereto annexed, have been taken from the report of the auditor general of the Commonwealth for 1893.

The capital stock, surplus funds and undivided profits of the fifty-five national banks in said tables referred to, have been taken from the sworn reports of their officers to the Controller of the Currency, under date of October 3, 1893, at or about which date appellant's tax was finally settled by the auditor general.

These said fifty-five national banks are numerically slightly less than one-sixth of all the national banks in the State of Pennsylvania.

The par value of the shares of stock of all the national banks existing in the State of Pennsylvania, October 3, 1893, did not exceed seventy-two millions of dollars, and the total actual or market
39 value of all the shares of stock of all the national banks in the State of Pennsylvania for 1893, did not exceed 130 millions of dollars.

The par value of the shares of stock of these fifty-five commuting banks was $12,307,220. Their total aggregate capital, undivided profits and surplus was $32,751,881. The ascertained aggregate actual or market value of the shares of stock of forty-six of these said national banks was $33,366,896, and the estimated actual value of the shares of stock of the remaining nine from which no returns have been received (the said estimate being based on the "book" value of their shares), is $2,514,000. The total actual value, therefore, of the shares of stock of these said fifty-five national banks of the State of Pennsylvania is not less than $35,882,928, all of which is taxed by the Commonwealth at a less rate than the shares of stock of the appellant bank are taxed; the average rate paid by forty-six of the said fifty-five national banks being $2\frac{36}{100}$ mills upon each dollar of the actual value of the shares, while the appellant bank has been assessed for 1893 four mills on each dollar of the actual value of its shares.

Affiant avers that under the Pennsylvania system of taxation in the Pennsylvania towns enumerated, to wit: Bloomsburg, Brad-

dock, Bristol, Brownsville, Chester, Clearfield, Connellsville, Doylestown, Erie, Harrisburg, Johnstown, Lebanon, Lewisburg, Lock Haven, Marietta, Media, Minersville, New Castle, Newton, Pennsburg, Quakerstown, Reading, Scranton, Uniontown, Warren and Wellsboro', in certain of them, all the "monied capital" invested in the shares of stocks of national banks located therein is taxed by the Commonwealth at a less rate than four mills upon its actual value, and in certain others, such as Scranton, Reading, Harrisburg, New Castle and others in which more than one national bank is located, the greater portion of the capital invested in the shares of stock of national banks located therein is taxed at a less rate than the
40 balance, to the disadvantage and damage of the said banks discriminated against by this system and in violation, as appellant avers, of section 5219 of the Revised Statutes of the United States, forbidding the taxation by the State of the shares of stock of national banks at a "greater rate" than other "monied capital."

Affiant avers that the said discriminations and exemptions from taxation result in an annual loss of revenue to the State of about $50,000, which is more than 10 per cent. of all the revenue derived by the State from the taxation of shares of national banks.

Affiant believes and avers that the greater portion of this monied capital so favored and exempted from taxation is in the hands of individual citizens of the State of Pennsylvania.

Affiant further avers that total capital of all the State banks of Pennsylvania for 1893, as set forth in the report of the superintendent of banking, was only the sum of $8,461,559. That the total of capital, surplus funds and undivided profits of all the State banks of Pennsylvania for 1893 was $14,321,350, and that the actual or market value of their shares of stock affiant believes and avers did not exceed $16,000,000.

Affiant avers that the following estimates are approximately true and correct:

Total revenue paid to the State in 1893 from tax on shares of bank stock (see auditor general's report)..	$530,222
Of which there were paid by State banks or other than national banks	63,895
Actual or market value of shares of stock of State banks paying this as a 4-mill tax, about.....	15,710,000
Balance paid by national banks.....	466,327
41 Of which amount there was paid by 54 commuting banks paying 8 mills on the value of their capital stock at par.....	96,857
Amount paid by other non-commuting banks being 4-mill tax on the actual value of their shares or commuting banks paying approximately a tax equivalent to 4 mills on the actual value of their shares.....	369,470
Actual value of shares yielding $369,470 from a 4-mill tax on actual value.....	92,367,500

Total actual value of shares of stock of 55 commuting banks paying average of 2.86 mills tax on actual value.	35,882,928
Total of actual value of all shares of stock of all national banks in State, 1893.....	128,250,428

Which should yield a revenue of $513,940 instead of $467,367 if uniformly taxed.

The amount of "monied capital" of the State invested in national bank shares, favored by the Pennsylvania system of taxation as to the total value of all such property of the State, is approximately as 35 : 128, the said thirty-five millions being more than twice the actual value of all the shares of stock of all State banks, a much more dangerous discrimination to the majority of national banks than an equal discrimination in favor of all the State banks of the Commonwealth.

W. A. SHAW.

Sworn to and subscribed this 20th day of June, 1894.

JOHN P. MELICK,
Prothonotary.

EXHIBIT "A."

Name of bank.	Capital.	Surplus.	Undivided profits.	Total "book value," capital, surplus and undivided profits.	Per share, "book value."	Per share, market value.	Tax paid.	Paid millage on "book value."	Paid millage on market value.	Value of total shares, market value.	Tax 4 mills on market value.	Amount lost to State by commuting.
1. Second National Bank, Allegheny	$150,000	$175,000	$18,658	$343,658	$229 00	$200 00	$1,200	3 49	4 00	$300,000	$1,200	.....
2. Citizens' National Bank, Asland	60,000	75,000	11,000	146,000	243 00	350 00	480	3 29	2 28	210,000	840	$360
3. First National Bank, Bloomsburg	50,000	75,000	13,500	148,500	287 00	260 00	400	2 80	3 08	130,000	520	120
4. Braddock National bank	100,000	135,000	13,000	248,000	248 00	245 00	300	3 22	3 26	245,000	980	180
5. Farm'e' Nat. B'k of Bucks Co., Bristol	92,220	115,000	20,061	227,281	246 00	346 00	737	3 24	2 30	319,696	1,278	541
6. National Deposit Bank, Brownsville	50,000	75,000	9,980	134,980	270 00	350 00	400	2 96	2 28	175,000	700	300
7. Delaware Co. Nat. Bank, Chester	300,000	300,000	42,800	642,800	214 00	250 00	2,400	3 73	3 20	750,000	3,000	600
8. County National Bank, Clearfield	100,000	140,000	28,184	268,181	268 00	200 00	800	2 98	4 00	200,000	800	.....
9. Doylestown Nat. Bank, Doylestown	100,000	105,000	43,834	253,834	242 00	434 00	840	3 39	1 84	455,700	1,822	982
10. Marine National Bank, Erie	150,000	170,000	43,555	363,555	242 00	.....	1,200	3 30	.....	.....	.....	.....
11. First National Bank, Franklin	100,000	100,000	31,375	231,375	231 00	300 00	800	3 45	2 66	300,000	1,200	400
12. First National Bank, Harrisburg	100,000	225,000	42,114	367,114	367 00	372 00	800	2 18	2 15	372,000	1,488	688
13. First National Bank, Johnstown	100,000	125,000	13,000	238,000	238 00	.....	800	3 36	.....	.....	.....	.....
14. First National Bank, Lebanon	50,000	50,000	22,314	122,314	244 00	339 00	400	3 27	3 31	169,500	678	278
15. Valley National Bank, Lebanon	100,000	115,000	21,159	236,159	236 00	328 00	800	3 38	2 44	328,000	1,312	512
16. Lewisburg Nat. Bank, Lewisburg	100,000	100,000	21,791	221,791	222 00	220 00	800	3 60	3 66	220,000	880	80
17. First National Bank, Marietta	100,000	100,000	25,512	225,512	225 00	212 00	800	3 54	3 76	212,000	848	48
18. First National Bank, Media	100,000	100,000	95,804	295,804	295 00	295 00	800	2 70	2 70	295,000	1,180	380
19. First National Bank, Minersville	100,000	150,000	45,804	295,804	295 00	.....	400	3 28	.....	.....	.....	.....
20. Nat. Bank, Law'nce Co., New Castle	50,000	70,000	2,000	122,000	244 00	388 00	1,200	1 84	2 01	582,000	2,328	1,128
21. First National Bank, Newton	150,000	400,000	98,144	648,144	432 00	240 00	800	3 73	3 33	240,000	960	160
22. Montgomery Nat. Bank, Norristown	100,000	100,000	14,318	214,318	214 00	250 00	1,600	3 28	3 12	500,000	2,000	400
23. Perkiomen Nat. Bank, Pennsburg	200,000	250,000	37,759	487,759	243 00	.....	800	3 05	.....	.....	.....	.....
24. Eighth National Bank, Philadelphia	100,000	150,000	12,245	262,245	297 00	300 00	2,200	2 69	2 67	825,000	3,300	1,100
25. Bank of North America, Philadelphia	275,000	500,000	42,131	817,131	267 00	265 00	6,000	2 98	3 02	2,650,000	10,600	2,600
26. Central National Bank, Philadelphia	1,000,000	1,300,000	376,649	2,676,649	330 00	365 00	6,000	2 41	2 19	2,737,500	10,950	4,950
27. City National Bank, Philadelphia	750,000	1,500,000	230,088	2,480,088	234 00	230 00	3,200	3 41	3 48	920,000	3,680	480
28. Consolidated Nat. Bank, Phila	400,000	450,000	86,965	936,965	217 00	217 00	2,400	3 67	3 67	652,000	2,608	208
29. Girard Nat. Bank, Philadelphia	200,000	300,000	52,483	652,483	242 00	225 00	3,000	3 30	3 55	2,250,000	9,000	1,000
30. Kensington Nat. Bank, Philadelphia	1,000,000	1,100,000	322,521	2,422,521	215 00	221 00	2,000	3 70	3 62	552,500	2,210	210
31. Nat. Bank of Germantown, Phila	250,000	250,000	38,929	538,929	298 00	322 00	1,600	2 72	2 48	644,000	2,574	974
32. Nat. Bank of N. Liberties, Phila	200,000	300,000	87,140	587,140	255 00	324 00	4,000	3 13	2 47	1,620,000	6,480	2,480
33. Tradesmen's National Bank, Phila	500,000	650,000	125,972	1,275,972	211 00	210 00	4,800	3 80	3 82	1,260,000	5,040	1,200
34. Second National Bank, Pittsburgh	600,000	600,000	64,819	1,264,819	251 00	300 00	2,400	3 18	2 66	450,000	1,760	160
35. Diamond National Bank, Pittsburgh	300,000	300,000	153,069	753,069	213 00	220 00	1,600	3 75	3 64	880,000	3,400	6,000
36. Farmers' Deposit Nat. Bank, Pitts'gh	200,000	180,000	46,622	426,622	483 00	725 00	2,400	1 73	1 11	2,175,000	8,700	400
37. First Nat. Bank, Birmingham, Pitts'h	300,000	1,000,000	88,134	1,388,134	271 00	300 00	800	2 94	2 66	300,000	1,200	1,050
38. German National Bank, Pittsburgh	100,000	100,000	71,321	271,321	337 00	305 00	2,000	2 37	2 62	762,500	3,050	.....
	250,000	500,000	93,852	843,852								

39. Pittsb'h Nat. B'k of Commerce, Pitts'h	500,000	550,000	57,541	1,107,541	221 00	300 00	4,000	3 61	2 66	1,500,000	6,000	2,000
40. Tradesmen's Nat. Bank, Pittsburgh	400,000	500,000	23,893	923,893	231 00	250 00	3,200	3 46	2 20	1,000,000	4,000	800
41. Union National Bank, Pittsburgh	250,000	750,000	40,051	1,040,051	416 00	500 00	2,000	1 92	1 60	1,250,000	5,000	3,000
42. Quakertown Nat. Bank, Quakertown	100,000	113,000	6,826	219,826	220 00	212 00	800	3 63	3 77	212,000	848	48
43. First National Bank, Reading	250,000	200,000	52,443	502,443	201 00	205 00	2,000	3 98	3 90	512,500	2,050	50
44. Farmers' National Bank, Reading	400,000	425,000	37,638	862,638	215 00	267 00	3,200	3 70	3 00	1,068,000	4,272	1,072
45. Keystone National Bank, Reading	100,000	120,000	13,035	253,035	233 00	250 00	800	3 43	3 12	250,000	1,000	200
46. National Union Bank, Reading	200,000	300,000	70,636	570,636	285 00	336 00	1,600	2 80	2 38	672,000	2,688	1,088
47. First National Bank, Scranton	300,000	670,000	151,147	1,021,147	510 00	600 00	1,600	1 56	1 33	1,200,000	4,800	3,200
48. Third National Bank, Scranton	200,000	230,000	80,498	510,498	255 00	.....	.....	.....	.....	.....	.....	.....
49. First National Bank, Sharon	125,000	125,000	27,967	277,967	222 00	.....	1,000	3 50	.....	.....	.....	.....
50. First National Bank, Uniontown	100,000	200,000	20,217	320,217	320 00	350 00	800	2 50	2 28	350,000	1,400	600
51. Nat. Bank, Fayette Co., Uniontown	100,000	125,000	8,095	233,095	233 00	300 00	800	3 47	2 67	300,000	1,200	400
52. Citizens' National Bank, Warren	100,000	100,000	9,729	209,729	209 00	.....	800	3 82	.....	.....	.....	.....
53. First National Bank, Wellsboro	100,000	100,000	28,715	228,715	287 00	.....	800	3 50	.....	.....	.....	.....
54. Wyoming Nat. Bank, Wilkesbarre	150,000	230,000	29,115	409,115	272 00	240 00	1,200	2 93	3 33	360,000	1,440	240
55. West branch Nat. Bank, Williamsp't	100,000	100,000	101,223	301,223	301 00	.....	800	2 65	.....	.....	.....	.....
Totals	$12,307,220	$17,168,000	$3,276,661	$32,751,881	$266 72 Avg.	$302 33 Avg.	$96,857	3 14 Avg.	2 86 Avg.	$33,366,896	$123,164	$42,907

44 COMMONWEALTH OF PENNSYLVANIA
vs.
THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PA.
No. 669. January Term, 1894.

And now, to wit, comes the defendant in above-entitled case & asks the court for leave to file a certain affidavit *nunc pro tunc*, as of the date of June 20, 1894, the same being the affidavit of W. A. Shaw, & marked "affidavit No. 3," a copy thereof having been previously furnished to the counsel for the Commonwealth.

THE MERCHANTS' & MANUFACTURERS' NATIONAL BANK OF PITTSBURGH,
By HALL & WILSON, *Counsel.*

Order of Court.

And now, to wit, the above motion having been made & no objection appearing on the part of the counsel for the Commonwealth, it is ordered that the affidavit marked & identified as "affidavit No. 3," of W. A. Shaw shall be filed in the above-stated case as of date of June 20, 1894, *nunc pro tunc.*

(Endorsed:) No. 669. Jan. T., 1894. Commonwealth of Pennsylvania *vs.* The Merchants' & Manufacturers' National Bank of Pittsburgh, Pa. Notice for leave to file supplementary affidavit and order of court on same. Filed June 20, '94. Hall & Wilson.

Page.	Report sup't of banking, 1893.	Cap. stock.	Surplus.	Undiv'd prof'ts.	Shares, par value.	P'd in.	Market value.	Tax paid.	Rate on actual value. Millage.
55	City Deposit Bank of Pittsburgh....	$50,000	70,000	12,231	50	37 50	.....	514	
82	Farmers' bank, Carlisle	50,000	50,000	2,761	50	50	117	400	$2\frac{4}{10}$
110	German saving- & deposit bank, Pittsburgh.....	100,000	100,000	110,191	50	50	125	800	$3\frac{4}{10}$
122	Hanover Saving- Fund Society, Hanover.....	50,000	85,000	3,808	10	10	35	400	$2\frac{3}{10}$
166	Miners' Saving- Bank of Pittston....	60,000	60,000	73,582	25	25	.....	480	
170	Miners' saving- bank, Wilkes Barre.	150,000	240,000	50,691	50	50	.....	1,200	
194	People's Bank of Philadelphia.....	150,000	250,000	7,666	100	100	.....	1,200	
205	People's bank, McKeesport.....	100,000	97,637	7,892	50	50	110	800	$3\frac{6}{10}$
217	Pittsburgh Bank for Savings.....	75,000	75,000	73,596	100	100	250	600	$3\frac{2}{10}$
239	Shrewsbury Savings Institution, Shrewsbury.....	25,000	35,000	4,206	20	10	22	221	
245	Warren savings bank, Warren	100,000	150,000	76,140	50	50	150	800	$2\frac{6}{10}$
332	Savings Institution of the City of Williamsport.....	11,200	100,000	8,034	100	100	1,100	89 60	$\frac{3}{4}$ of a mill.

46 [Endorsed:] No. 669. Jan. T., 1894. Commonwealth of Pennsylvania *vs.* Merchants' & Manufacturers' National Bank of Pittsburgh, Pa. Memorandum of State banks favored by taxing system.

47 *Affidavit No. 3 of W. A. Shaw.*

ALLEGHENY COUNTY, *ss:*

On this 27th day of September, 1894, before me, the prothonotary for the courts of common pleas of said county, personally appeared W. A. Shaw, who, being by me duly sworn according to law, did depose and say that he is cashier of the Merchants' and Manufacturers' National Bank of Pittsburgh, Pennsylvania, the defendant in the above-entitled suit; that he has taken pains to inform himself as to the facts and matters herein set forth, and believes and avers that the facts stated in this, his solemn affidavit, are true and correct.

Affiant avers that the facts herein set forth as to the amount paid by way of taxes to the Commonwealth by the banks chartered by the Commonwealth, hereinafter referred to, are taken from the report of the auditor general of Pennsylvania for the year 1893, and that the actual values of the shares of stock of the several State banks herein designated are taken from the report of the superintendent of banking of Pennsylvania for the same year, and that the computations showing the rates of taxes paid by the said State banks, hereinafter mentioned, are true and correct.

Affiant avers that there were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, State banks chartered by the Commonwealth, being banks of deposit and discount, the aggregate of whose entire capital stock at par was $8,461,559. That the total aggregate of capital, surplus funds and undivided profits of all the said State banks was $14,321,350, and the total actual or market value of all their shares did not exceed the
48 sum of $16,000,000, and that of these said State banks a considerable number were taxed by the Commonwealth for 1893 at a less rate than four mills on each dollar of the actual value of their shares of stock, as shown by the report of the auditor general and the report of the superintendent of banking.

In this class of State banks of deposit and discount paying a tax of less than four mills of the actual value of their shares were:

(*a*) The German Savings and Deposit Bank of Birmingham, Pittsburgh, which paid a tax for 1893 of $800 on shares of stock of the par value of $100,000, but of an actual value of $250,000, the same being a tax of only 3.2 mills on each dollar of the actual value thereof.

(*b*) The Pittsburgh Bank for Savings of Pittsburgh, Pennsylvania, which paid a tax for 1893 of $600 on shares of stock of a par value of $75,000, but of an actual value of $187,500, being a tax of only 3.2 mills on each dollar of the actual value thereof.

(*c*) The Farmers' Bank of Carlisle, which paid a State tax for 1893 of $400 on shares of stock of a par value of $50,000, but of an actual value of $117,000, being a tax of only 3.4 mills on each dollar of the actual value thereof.

(*d*) The Hanover Savings Fund Society of Hanover, which paid a

State tax for 1893 of $400 upon shares of stock of a par value of $50,000, but of an actual value of $178,750, being a tax of only 2.2 mills on each dollar of the actual value thereof.

(*e*) The People's Bank of McKeesport, which paid a State tax for 1893 of $800 on shares of stock of a par value of $100,000,
49 but of an actual value of $220,000, being a tax of only 3.6 mills on each dollar of the actual value thereof.

(*f*) The Warren Savings Bank of Warren, Pennsylvania, which paid a State tax for 1893 of $800 on shares of stock of a par value of $100,000, but of an actual value of $300,000, being a tax of only 2.7 mills on each dollar of the actual value thereof.

(*g*) The Savings Institution of the City of Williamsport, which paid a State tax for 1893 of $89.60 on shares of stock of a par value of $11,200, but of an actual value of $123,200, being a tax of only eight-tenths of one mill on each dollar of the actual value thereof.

That the aggregate actual value of all the shares of stock of the aforesaid State banks is $1,376,450, and the average rate of tax paid by the said seven State banks was 2.9 mills on each dollar of the actual value of their said shares.

Besides the above-mentioned State banks, the Butler Savings Bank of Butler, capital stock $60,000; the City Deposit Bank of Pittsburgh, capital $64,250; the Miners' Savings Bank of Pittston, capital $60,000; the Miners' Savings Bank of Wilkes Barre, capital $150,000; the Shrewsbury Savings Institution of Shrewsbury, capital $50,000, by paying an eight-mill tax on each dollar of the value of their shares of stock, at par, manifestly paid less than a four-mill tax on the actual value of their shares, though their returns to the superintendent of banking are incomplete in not giving the actual or market value of their shares of stock.

The aforesaid banks are banks of deposit and discount, and are in competition with the national banks of the Commonwealth.

That not less than twelve per cent. of all monied capital in
50 the State of Pennsylvania in the hands of individual citizens thereof, and invested in the shares of stock of State banks was taxed in 1893 by the Commonwealth at a less rate than four mills on each dollar of the actual value thereof.

W. A. SHAW.

Sworn and subscribed before me this 27th day of September, A. D. 1894.

JOHN BRADLEY,
Prothonotary.

Request of Defendant for Findings of Fact.

The learned court was requested to make the following findings of fact:

1. Defendant is a national bank organized under the act of Congress of June 3, 1864, and doing business in the city of Pittsburgh, Pennsylvania. Its cashier reported to the auditor general for 1893,

in pursuance of the direction of the seventh section of the act of June 8, 1891, P. L. 242: "Whole number of the shares of stock issued," 16,000; "actual value of each share," $65.00; "actual value of capital stock issued," $1,040,000.

On this "actual value of capital stock issued," $1,040,000, the auditor general of the Commonwealth settled a tax, November 1, 1893, of $4,160, purporting to be a tax of four mills on each dollar of the actual value of the capital stock issued. From this settlement, December 28, 1893, the bank appealed.

51 2. That there were in the city of Pittsburgh during the said year of 1893 twenty-seven national banks chartered under the same act of Congress, and doing the same kind of business as the appellant bank, to wit, the ordinary and general business of a national bank, the aggregate value of whose entire shares of capital stock at par was $11,200,000, the aggregate actual or market value of which was at the same date $21,226,875, and the shares of the other said twenty-six banks were of the same class of property as the shares of appellant.

3. That there were in the State of Pennsylvania during the said year of 1893 about 336 national banks doing the same kind of business as the appellant, the aggregate value of whose entire shares of capital stock at par was about $72,000,000, the aggregate actual or market value of which was about $128,250,428, the shares in which banks were of the same class of property as the shares of appellant.

4. That of the said twenty-seven national banks doing business in the city of Pittsburgh in 1893, nine having capital stock of a total aggregate par valuation of $2,800,000 and a total actual or market valuation of $9,427,500, paid to the Commonwealth a tax on the said actual valuation of their capital stock for the year 1893, as appears by the report of the auditor general, in the following amounts, and at the rates per cent. respectively hereinafter set forth, the said banks having elected, under section 6 of the act of June 8, 1891, P. L. 240, to pay an eight-mill tax on the par value of their shares of stock "subscribed for or issued."

52	Capital at par.	Actual value.	Millage rate on actual value	Amount paid.
Farmers' Deposit National.....	$300,000	$2,175,000	1 14	$2,400
German National	250,000	762,500	2 62	2,000
Union National.....	250,000	1,250,000	1 60	2,000
Tradesmen's National.....	400,000	1,000,000	3 20	3,200
First National, Birmingham...	100,000	300,000	2 66	800
Second National, Pittsburgh...	300,000	900,000	2 66	2,400
Diamond National	200,000	440,000	3 64	1,600
Pittsb'gh Nat. B'k of Comm'ce.	500,000	1,500,000	2 66	4,000
Mechanics' National	500,000	1,100,000	3 60	4,000
	$2,800,000	$9,427,500	2 36 Avg.	$22,400

The average rate of taxation paid by the said nine national banks in the city of Pittsburgh for 1893 upon their actual value of their shares of stock "subscribed for or issued" was at the rate of 2.36 mills on each dollar, while the appellant has been assessed four mills on each dollar of the actual value of its capital stock issued.

5. In like manner, of the entire number of national banks doing business in the State of Pennsylvania fifty-five national banks, having capital stock of a par valuation of $12,307,220 and a total actual valuation of about $35,882,928, were taxed by the Commonwealth for the year 1893 at an average rate of 2.86 mills upon each dollar of the actual valuation of the shares of their capital stock.

These banks elected to pay an eight-mill tax on the par value of their shares under the said section 6 of the act of June 8, 1891, which election was also open to the appellant, but in the case of the appellant an election to pay a tax of eight mills on the par value of all its shares of stock subscribed or issued would have been an election to pay a tax of 6.2 mills on each dollar of the actual or market value thereof.

53 6. That there were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, State banks chartered by the Commonwealth, the aggregate of whose entire capital stock at par amounted to $8,461,559.

That the total aggregate of capital, surplus funds and undivided profits of all the said State banks was $14,321,350, and the total actual or market value of all their shares did not exceed the sum of $16,000,000, and that of these said State banks a considerable number were taxed by the Commonwealth for 1893 at a less rate than four mills on each dollar of the actual value of their shares of stock, as shown by the report of the auditor general and the report of the superintendent of banking.

In this class of State banks of deposit and discount, paying a tax of less than four mills on the actual value of their shares, were:

(*a*) The German Savings and Deposit Bank of Birmingham, Pittsburgh, which paid a tax for 1893 of $800 on shares of stock of a par value of $100,000, but an actual value of $250,000, being a tax of only 3.2 mills on each dollar of the actual value thereof.

(*b*) The Pittsburgh Bank for Savings of Pittsburgh, Pa., which paid a tax for 1893 of $600 on shares of stock of a par value of $75,000, but an actual value of $187,500, being a tax of only 3.2 mills on each dollar of the actual value thereof.

(*c*) Farmers' Bank of Carlisle, which paid a State tax for 1893 of $400 on shares of stock of a par value of $50,000, but of an actual value of $117,000, being a tax of only 3.4 mills on each dollar of the actual value thereof.

(*d*) The Hanover Savings Fund Society of Hanover, which
54 paid a State tax for 1893 of $400 on shares of stock of a par value of $50,000, but of an actual value of $178,750, being a tax of only 2.2 mills on each dollar of the actual value thereof.

(*e*) The People's Bank of McKeesport, which paid a State tax for 1893 of $800 on shares of stock of a par value of $100,000, but of

an actual value of $220,000, being a tax of only 3.6 mills on each dollar of the actual value thereof.

(*f*) The Warren Savings Bank of Warren, Pa., which paid a State tax for 1893 of $800 on shares of stock of a par value of $100,000, but of an actual value of $300,000, being a tax of only 2.7 mills on each dollar of the actual value thereof.

(*g*) The Savings Institution of the City of Williamsport, which paid a State tax for 1893 of $89.60 on shares of stock of a par value of $11,200, but of an actual value of $123,200, being a tax of only $\frac{8}{10}$ of one mill on each dollar of the actual value thereof.

That the aggregate actual value of all the shares of stock of the aforesaid State banks is $1,376,450, and the average rate of tax paid by the said seven State banks is 2.9 mills on each dollar of the actual value of their said shares.

Besides the above State banks, the Butler Savings Bank of Butler, capital stock $60,000; the City Deposit Bank of Pittsburgh, capital $64,250; the Miners' Savings Bank of Pittston, capital $60,000; the Miners' Savings Bank of Wilkesbarre, capital $150,000; the Shrewsbury Savings Institution of Shrewsbury, capital $50,000, by paying an eight-mill tax on each dollar of the value of their shares of stock at par, manifestly paid less than a four-mill tax on the actual value of their shares, though their returns to the superintendent of banking are incomplete in not giving the actual or market value of their shares of stock.

55 The aforesaid banks are banks of deposit and discount, and are in competition with national banks of the Commonwealth.

7. That not less than twelve per cent. of all monied capital in the State of Pennsylvania in the hands of individual citizens thereof, and invested in the shares of State banks, was taxed in 1893 by the Commonwealth at a less rate than four mills on each dollar of the actual value thereof, and that $\frac{9\,1}{1\,2\,8}$, or 27.3 per cent., of all monied capital in the hands of citizens thereof, and invested in the shares of stock of national banks in Pennsylvania were taxed by the Commonwealth in 1893 at a less rate than four mills on the actual value thereof, and that $\frac{7\,5}{1\,9\,2}$, or 39 per cent., of all monied capital in the hands of individual citizens of the State of Pennsylvania, invested in the shares of stock of national banks in the city of Pittsburgh directly in competition with the appellant, were taxed by the Commonwealth at a less rate than four mills on the actual value thereof during the year 1893.

8. That the total amount of revenue lost to the State in 1893 by the system of commutation of the tax on shares of stock of national and State banks allowed in section 6 of the act of June 8, 1891, was not less than $50,000 (the same being more than 10 per cent. of all revenue derived by the Commonwealth from this source of taxation), and that as to the aforesaid nine national banks in the city of Pittsburgh, if they had been assessed and had paid a State tax at the same rate as appellant is assessed—

The Farmers' Deposit National would have paid to the State a tax of $8,700 instead of $2,400.

The German National would have paid $3,050 instead of $2,000.

56 The Union National bank would have paid $5,000 instead of $2,000.

The Tradesmen's National bank would have paid $4,240 instead of $3,200.

The First National Bank of Birmingham, Pittsburgh, would have paid $1,200 instead of $800.

The Second National Bank of Pittsburgh would have paid $3,540 instead of $2,400.

The Diamond National Bank of Pittsburgh would have paid $1,760 instead of $1,600.

The Pittsburgh National Bank of Commerce would have paid $6,000 instead of $3,000.

The Mechanics' National Bank of Pittsburgh would have paid $4,400 instead of $4,000, and the entire list of fifty-five national banks and twelve State banks aforesaid would have paid upwards of $50,000 more in taxes to the Commonwealth than they did pay.

9. That by the said act of June 8, 1891, the banks electing to pay the eight-mill tax on the par value of their shares are taxed on the shares "subscribed for or issued," while the non-electing banks are assessed four mills only on the shares of stock issued and shares subscribed for, but not issued in non-electing banks, are not taxed at all.

10. That under the said Pennsylvania system of taxation in the towns enumerated, to wit, Bloomsburg, Braddock, Bristol, Brownsville, Chester, Clearfield, Connellsville, Doylestown, Erie, Harrisburg, Johnstown, Lebanon, Lewisburg, Lock Haven, Marietta, Media, Minersville, New Castle, Newton, Pennsburg, Quakerstown, Reading, Scranton, Uniontown, Warren and Wellsboro', in certain of them all the monied capital invested in the shares of stock of national banks is taxed by the Commonwealth at a less rate than four mills upon each dollar of the actual value thereof;

57 and in certain others of them, such as Scranton, Reading, Harrisburg, New Castle and others, in which more than one national bank is located, the greater portion of the capital invested in the shares of stock of national banks is taxed at a less rate than the balance, to the disadvantage of the monied capital invested in the shares of national banks thus discriminated against.

11. That the act of June 8, 1891, sections 6 and 7, authorized the taxation of shares of stock of different national banks in the Commonwealth for the year 1893 and thereafter at different rates, allowed different times for the payment of the said tax, exempted certain banks from local taxation and did not exempt others, provided diverse methods of valuing the shares of stock of members of the same class, to wit, national banks, and authorized a tax in the case of some national banks of eight mills on the par value of the shares "subscribed or issued," and in the case of other national banks of four mills only on the actual value of all the shares "issued," allowing in the latter case the shares "subscribed" but not "issued" to bear no tax whatever.

12. That the tax appealed from is made a lien upon the franchise and real and personal property of the bank by section 31 of the act of June 1, 1889, P. L. 437, and in the blank form furnished by the auditor general to the said appellant, purports to be a tax on the "actual value of the capital stock issued," and not a tax on the shares of stock.

13. That article IX, section 1, clause 1, of the constitution of the Commonwealth is as follows:

"All taxes shall be uniform upon the same class of subjects
58 within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

14. That section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value as other real property is taxed."

15. That art. XIV, section 1, clause 3, of the amendments to the Constitution of the United States is as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Findings of fact presented by counsel and ordered to be filed.

By the court:

J. W. SIMONTON, *P. J.*

Filed June 20, 1894.

59 *Opinion of the Court of Common Pleas of Dauphin County.*

By the COURT:

This is an appeal by defendant from an account settled against it by the auditor general and State treasurer, November 1, 1893, for tax on capital stock for the year 1893, amounting to $4,160; and it was by agreement of the parties tried by the court without a jury, as provided by the act of April 22, 1874.

Findings of Fact.

1. Defendant is a national bank, organized under the act of Congress of June 3, 1864, and doing business in the city of Pittsburgh,

Pennsylvania. Its cashier reported, as required by section 7 of the act of June 8, 1891, (P. L., 242), to the auditor general that the whole number of shares of its capital stock issued was 16,000; the actual value of each share, $65; and the actual value of capital stock issued, $1,040,000.

60 On this actual value of capital stock issued the auditor general and State treasurer settled an account, November 18, 1893, charging defendant with a tax of four mills on each dollar of said actual value, amounting to $4,160; and from said settlement this appeal was taken, December 28, 1893.

2. There were, in the city of Pittsburgh, during the year 1893, twenty-seven national banks chartered under the same act of Congress, and doing the ordinary and general business of a national bank, as was defendant, the aggregate par value of whose shares of capital stock was $11,200,000, its actual market value being largely in excess of the par value and estimated at $21,226,875.

3. There were in the State of Pennsylvania, during said year 1893, about 336 national banks doing the same kind of business as defendant, the aggregate par value of whose shares of capital stock was about $72,000,000, its market value being much greater, and estimated at about $128,000,000.

4. Nine of the said twenty-seven national banks doing business in the city of Pittsburgh in 1893, having capital stock of the par value of $2,800,000, elected to collect from their shareholders for the year 1893 a tax of eight mills on the dollar upon the par value of their shares, as provided by section 6 of the act of June 8, 1891. The actual value of all the shares of said banks was more than three times the par value, and the amount of tax paid by said banks was therefore much less than it would have been if they had paid four mills on the actual value of all their shares.

5. There were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, a number of State banks whose entire capital stock at par amounted to $8,461,559;

61 and as reported by them to the superintendent of banking, their total capital, surplus funds and undivided profits amounted to $14,321,350 and the market value of their shares to $16,000,000, and a number of these, whose aggregate capital amounted to not less than 12 per cent. of all the monied capital invested in shares of State banks in Pennsylvania, by electing to pay the eight mills under said section 6, paid a less amount of tax than they would have paid if they had been taxed at the rate of four mills upon the actual value of all their shares.

These facts are found from affidavits presented on the trial and received with the consent of the Commonwealth as depositions.

The learned counsel for defendant have stated in writing the facts as they understand them to be shown by the evidence, and have requested us to adopt their findings as the facts of the case. Some parts of these findings are, however, conclusions of law, and these we do not adopt. But so far as these findings state matters of fact, and are not in conflict with the facts above found by us, we adopt them for the purposes of this case, to show the working

of the taxing act in question and the degree to which it produces a lack of uniformity of taxes. They will, therefore, be filed herewith.

Section 6 of the act of June 8, 1891, provides that any bank of savings institution incorporated by this State or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders, and pay into the State treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued; and section 7 imposes upon every national bank located within this Commonwealth which fails to collect and pay said tax of eight mills a tax of four mills upon the actual value of all the shares of its capital stock.

62 Defendant objects, by its first specification of appeal, that these sections of the act are repugnant to article IX, section 1, of the constitution of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The contention is, that by the terms of these sections of the act in question some national banks of the State are permitted to elect to pay a less rate of tax than four mills upon the dollar of the actual value of their capital stock, while others are required to pay tax at this rate. This result does actually follow the working of the act, for the reason that the par value of the capital stock of some of these banks is so much less than the actual value that a tax upon the former at eight mills is less than a tax on the latter at four mills would be, and naturally these banks elect to pay the eight mills, while others, whose par value is more nearly equal to their actual value, for the same reason decline to pay the eight mills, and are taxed at the rate of four mills upon the actual value of their capital stock. Therefore, while the right of election is given to all, it is the interest of some to elect and of others not to elect, and thus actual and absolute uniformity of taxation is not attained, and is shown by the finding of facts.

A discussion of the numerous cases cited by counsel for defendant, in which the courts of other States have considered and passed upon the question of the constitutionality of taxing acts, in view of the requirement in their constitutions that taxation shall be uniform, would serve no useful purpose. Many of them were cited and discussed by counsel and by the court in Com. *vs.* Del. Div. Canal Co., 123 Pa., 594, where the defendant contended that section 4 of the act of June 30, 1885, taxing corporate loans, was

63 unconstitutional because the taxes imposed by it were not uniform.

In that case the court below found as a fact (page 597) that "the nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value, which is often either above or below their par value, the actual value being dependent upon the value of the property mortgaged, the rate of interest, the date of maturity and other conditions, some bonds upon which interest is regularly paid selling as low as fifty cents on the

dollar, and others as high as one hundred and fifty;" and in discussing the law, said: "When, however, the law itself is so framed that it necessarily produces gross inequality of burden, no matter how perfectly it may be administered, it would seem impossible to avoid the conclusion that it violates the mandate of the Constitution. * * * But if in one case the value to which the rate is applied is the expression of the judgment of the proper official, and in another a mere arbitrary nominal value, it is in the very nature of the case that the resulting taxes cannot be uniform. There can be no definite proportion between the value of the property of the citizen and the amount of his taxes. And, as the findings of fact show, this would be the inevitable consequence of the enforcement of the law in this case, no matter how faultless its administration might be." And the court below, therefore, held the taxing section there in question unconstitutional. But on appeal the supreme court, in an opinion by the late Mr. Justice Clark, reversed this decision, and, notwithstanding the fact that some of the securities, taxed at their nominal or face value, sold in the market as low as fifty cents, and others as high as one hundred and fifty cents, on the dollar, held that the taxing section was constitutional, and that the taxes were uniform in the sense of that instrument.

64 There was certainly as great a want of actual uniformity in the taxes imposed by that act as there is in those collected under the two sections of the act of June 8, 1891, in question in this case, for, as was shown by the finding of fact quoted above, under it the same amount of tax might be imposed on a bond worth $500 as upon another worth $1,500.

That case was followed by Com. *vs.* Brush Elec. Light Co., 145 Pa., 147, where the findings of fact showed that under the normal working of section 4 of the act of June 7, 1879 (P. L., 114), the tax imposed by it on corporations ranged in amount from less than two mills to over five mills on the actual value of their respective capital stocks, as will be seen by referring to finding of fact No. 5 on page 149 of 145 Pa., and to the table prepared from the evidence and made part of said finding, which is to be found in the report of the same case in 28 W. N., 529.

The court below, however, held said section constitutional, on the authority of the Del. Div. Canal Co. case above cited, and this ruling was affirmed by the supreme court, Mr. Justice Williams in the opinion saying: "This is justified by Com. *vs.* Canal Co., 123 Pa., 594. * * * And the learned judge was right in his conclusion that the provisions of the act of 1879 relating to this subject are not objectionable on constitutional grounds."

We are unable to distinguish these cases from the one before us. The want of actual uniformity is, as the findings of fact above referred to show, not greater here than it was in those cases, and we therefore think that they preclude any further discussion of the question raised by defendant's first specification of appeal.

Defendant has specified in its appeal the further objection that the settlement is invalid, because said sections of the act of June 8,

1891, are in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely, "that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State."

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The learned counsel rest their attempt to sustain this objection upon the proposition, stated in their brief, "that the words 'other monied capital' in section 5219 of the United States Revised Statutes means particularly other monied capital invested in the banking business, that is, the shares of stock in banks, national or State;" and this being so, that as the act of 1891 allows some national banks to pay eight mills on the par value of their shares while others are taxed at the rate of four mills on the actual value of their shares, the requirement of the statute, that the shares of national banks shall not be taxed at a greater rate than other monied capital, is violated.

But an examination of the cases decided by the United States Supreme Court which are cited by counsel shows that this is not the meaning of the words "other monied capital."

Thus in Hepburn *vs.* The School Directors, 23 Wall., 480, the argument on behalf of the plaintiff was that "monied capital in the hands of individual citizens means private investments other than in stocks or securities." But in answer to this the chief justice, delivering the opinion of the court, said: "It is contended that the term 'monied capital,' as here used, signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par of these shares is their maximum taxable value."

"We cannot concede that money at interest is the only monied capital included in that term as here used by Congress. The words are 'other monied capital.' That certainly makes stock in these banks monied capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term. But even if it were true that these shares can only be taxed as money at interest is the result contended for would not necessarily follow." That is to say, stock in national banks is "monied capital," and other investments in stock and securities are "other monied capital."

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So in Mercantile Bank *vs.* New York, 121 U. S., 138, when the court, speaking of the meaning of the words "other monied capital" as used in the statute, say: "Of course it includes shares in national banks; the use of the word 'other' requires this. If bank shares were not monied capital, the use of the word 'other' in this connection would be without significance;" the meaning is the same. The contrast is between national-bank shares, which are monied capital, and shares of stock in other institutions and securities of other kinds, which are "other monied capital;" and the true meaning of this section of the revised statute is as stated in Boyer *vs.* Boyer, 113 U. S., 689, on page 702: "Capital invested in national-bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority as the

State establishes for other monied capital in the hands of individual citizens, however invested, whether in State-bank shares or otherwise."

The statute does not deal with the question of uniformity of taxation of the shares of different national banks as between themselves, but is simply intended to protect them from taxation at a higher rate than that imposed upon monied capital invested otherwise than in the shares of national banks.

Defendant in its appeal specifies the further objection that the taxing act upon which the settlement appealed from is
67 based provides no means of notice to the shareholders of the stock upon which the tax is imposed.

The argument is that the tax is in effect a tax upon the shareholders, and that it is imposed upon them without notice or any provision for notice to them.

The principle upon which this tax is assessed with respect to notice is the same as that upon which the tax on the capital stock of other corporations is, and has been for half a century, assessed. The settlement is made against the corporation, which is considered for the purpose of taxation the representative of the shareholders. Furthermore, it has been decided in recent cases by the Supreme Court that the corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same: Com. *vs.* Fall Brook Coal Co., 156 Pa., 488; Com. *vs.* Lehigh Coal & Nav. Co., 162 Pa., 603. This being so, notice to the corporation would seem to be, to all intents and purposes, notice to the shareholders. And it has frequently been held that the corporation is not entitled to notice before the settlement is made, but that the requirement of the act of 1811, in relation to public accounts, that a copy of the account settled shall be mailed to the corporation, with the right of appeal from the settlement during sixty days thereafter, is a sufficient provision for notice; and that, where the copy of the settlement was not actually received, an action brought for the amount of the tax is sufficient notice. And the law evidently presumes that the officers of the bank will notify their stockholders, for, prescribing in section 7 the duties of the auditor general in assessing this tax, it declares that "it shall be his further duty to hear any stockholders who may desire to be heard on the question of the valuation of the shares as aforesaid." For these reasons we think these objections cannot be sustained.

68 Nor do we think this taxing act is open to the final objection specified in the appeal, that it is in conflict with "amendment XIV of the Constitution of the United States, section 1, which, in part, is as follows: 'Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.'"

The question intended to be raised by this specification was, we think, settled by the Supreme Court of the United States in Bell's Gap Railroad Co. *vs.* Pennsylvania, 134 U. S., 232, followed by Jennings *vs.* Coal Ridge Improvement & Coal Co., 147 U. S., —, and it is therefore not now open for discussion.

We therefore conclude:

1. That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article IX, section 1, of the constitution of the State of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

2. That said sections of said act are not in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely: "That the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State."

3. That the taxing act upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice.

4. That said taxing act is not in conflict with amendment
69 XIV of the Constitution of the United States, section 1, which (*inter alia*) ordains as follows: "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The Commonwealth is therefore entitled to recover as follows:

Amount of tax as per settlement	$4,160 00
Interest from Jan. 1 to Nov. 22, 1894, @ 12 per cent. per annum	401 46
Attorney General's com'sion, 5 per cent.	208 00
Total	$4,769 46

For which amount judgment is directed to be entered in favor of the Commonwealth and against defendant if exceptions be not filed within the time limited by law.

J. W. SIMONTON, *P. J.*

Exceptions to Findings of Fact and of Law and to Opinion of the Court.

And now, to wit, November 12th, 1894, comes the defendant by its counsel and files the following exceptions to the findings of the learned court:

1. The court erred in not finding as a fact that the total actual or market value of shares of stock of the nine (9) national banks located in the city of Pittsburgh and referred to in the court's fourth finding of fact, was $9,427,500. That the rate paid by the said nine (9) national banks upon each dollar of the actual value of their shares of stock were shown in the accompanying table as
70 well as the par and actual values of the shares and the total amount of tax paid by the said nine national banks.

	Capital at par.	Actual value.	Millage rate on actual value.	Amount paid.
Farmers' Deposit National.....	$300,000	$2,175,000	1 11	$2,400
German National	250,000	762,500	2 62	2,000
Union National.....	250,000	1,250,000	1 60	2,000
Tradesmen's National.....	400,000	1,000,000	3 20	3,200
First National, Birmingham...	100,000	300,000	2 66	800
Second National, Pittsburgh...	300,000	900,000	2 66	2,400
Diamond National	200.000	440,000	3 64	1,600
Pittsb'gh Nat. B'k of Comm'ce.	500,000	1,500,000	2 66	4,000
Mechanics' National.....	500,000	1,100,000	3 60	4,000
	$2,800,000	$9,427,500	2 36 Avg.	$22,400

And that the average rate of taxation paid by the said nine (9) national banks in the city of Pittsburgh for 1893 upon the actual value of their shares of stock "subscribed for or issued" was the rate of 2.36 mills on each dollar.

2. The court erred in not finding as a fact that of the entire number of national banks doing business in the State of Pennsylvania fifty-five (55) national banks, having capital stock of a par valuation of $12,307,220 and a total actual valuation of at least $35,882,928, were taxed by the Commonwealth for the year 1893 at an average rate of 2.86 mills upon each dollar of the actual valuation of the shares of their capital stock issued. That these banks elected to pay an eight-mill tax on the par value of their shares subscribed for or issued under the said section 6 of the act of June 8, 1891, which election was also open to the defendant. An election to pay a taxation of eight mills on the par value of all the shares of its stock under such section, would have been an election to pay a tax of 6 2 on each dollar of the actual or market value of its shares.

71 3. The learned court erred in not finding specifically as a fact that the following State banks of deposit and discount, chartered by the Commonwealth, and in business competition with the national banks of the Commonwealth, were taxed by the Commonwealth for 1893, at a less rate than the defendant is taxed, to wit:

The German Savings and Deposit Bank of Birmingham, Pittsburgh, being taxed at a rate of 3.2 mills on each dollar of the actual value of its shares of stock.

The Pittsburgh Bank for Savings of Pittsburgh at a rate of 3.2 mills.

The Farmers' Bank of Carlisle at a rate of 3.4 mills.

The Hanover Savings Society of Hanover at a rate of 3.2 mills.

The People's Bank of McKeesport at a rate of 3.6 mills.

The Warren Savings Bank of Warren, Pa., at a rate of 2.7 mills.

The Savings Institution of the City of Williamsport at a rate of .8 of a mill.

That the average rate paid by the aforesaid State banks was 2.9

mills on each dollar of the actual value of their shares of stock. That the Butler Savings Bank of Butler, the City Deposit Bank of Pittsburgh, the Miners' Savings Bank of Pittston, the Miners' Savings Bank of Wilkes Barre, the Shrewsbury Savings Institution of Shrewsbury, were taxed and paid taxes at a less rate than 4 mills on the actual value of their shares of stock.

4. The learned court erred in not finding as a fact, not only that at least 12 per cent. of all monied capital in the State of Pennsylvania in the hands of individual citizens thereof, invested in the shares of State banks located therein, was taxed in 1893 at a less rate than 4 mills on each dollar of the actual value thereof,
72 but also at least 27.3 per cent. of all monied capital in the hands of citizens thereof, and invested in the shares of stock of national banks in Pennsylvania, were taxed in 1893 at a less rate than 4 mills on each dollar of the actual value thereof, and that more than 39 per cent. of all monied capital in the hands of individual citizens of the State of Pennsylvania, invested in the shares of stock of national banks in the city of Pittsburgh directly in competition with the defendant, were taxed at a less rate than 4 mills on each dollar of the actual value thereof during the year 1893.

The court erred in not finding as a fact that the total amount of revenue lost to the State in 1893 by the system of commutation of the tax on shares of stock of national and State banks allowed in section 6 of the act of June 8, 1891, was not less than $50,000, and this sum was at least 10 per cent. of all revenue derived by the Commonwealth from this source of taxation.

6. The court erred in not finding specifically as a fact that of the said nine (9) national banks in the city of Pittsburgh above referred to, if they had paid the State tax at the same rate the defendant is assessed,

The Farmers' Deposit National bank would have paid to the State a tax of $8,700 instead of $2,400.

The German National bank would have paid $3,050 instead of $2,000.

The Union National bank would have paid $5,000 instead of $2,000.

The Tradesmen's National bank would have paid $4,240 instead of $3,200.

The First National Bank of Birmingham, Pittsburgh, would have paid $1,200 instead of $800.

The Second National Bank of Pittsburgh would have paid $3,540 instead of $2,400.

73 The Diamond National Bank of Pittsburgh would have paid $1,760 instead of $1,600.

The Pittsburgh National Bank of Commerce would have paid $6,000 instead of $3,000.

The Mechanics' National Bank of Pittsburgh would have paid $4,400 instead of $4,000, and the entire list of fifty-five national banks and twelve State banks aforesaid would have paid upwards of $50,000 more in taxes to the Commonwealth than they did pay.

7. The court erred in not finding specifically as a fact that by the act of June 8, 1891, those banks which elected to pay an eight-mill tax on the par value of their shares were taxed on the shares "subscribed for or issued," while the non-electing banks were assessed four mills only on the shares of stock "issued," and that shares subscribed for but not issued in the said non-electing banks were not taxed at all.

8. The court erred in not finding as a fact that under the said Pennsylvania system of taxation in the towns enumerated, to wit, Bloomsburg, Braddock, Bristol, Brownsville, Chester, Clearfield, Connellsville, Doylestown, Erie, Harrisburg, Johnstown, Lebanon, Lewisburgh, Lock Haven, Marietta, Media, Minersville, New Castle, Newton, Pennsburg, Quakerstown, Reading, Scranton, Uniontown, Warren and Wellsboro', in certain of them all the monied capital invested in the shares of stock of national banks located therein was taxed by the Commonwealth at a less rate than four mills upon each dollar of the actual value thereof; and in certain others of them, such as Scranton, Reading, Harrisburg, New Castle and others, in which more than one national bank is located, the greater portion of the capital invested in the shares of stock of national banks located therein is taxed at a less rate than the balance, and
74 that this fact is a disadvantage to the monied capital invested in the shares of national banks thus discriminated against.

9. The learned court erred in not finding as a fact that the act of June 8, 1891, sections 6 and 7, authorized the taxation of shares of stock of different national banks in the Commonwealth for the year 1893 and thereafter at different rates, allowed different times for the payment of said tax, exempted certain banks from local tax and did exempt others, provided diverse methods for valuing the shares of stock of members of the same class, to wit, national banks, and authorized a tax in the case of some national banks of eight mills on each dollar of the par value of the shares "subscribed or issued," and in the case of other national banks of four mills only on the actual value of all the shares "issued," and that the act, as a matter of fact, in the latter class allowed shares of stock "subscribed" but not "issued" to be exempt from taxation.

10. The learned court erred in not finding as a conclusion of law that the tax appealed from is made a lien upon the franchise and real and personal property of the bank by section 31 of the act of June 1, 1889, P. L. 437, and that the Commonwealth seeks to collect the said tax as a tax on the "actual value of the capital stock issued," and not as a tax "on the shares of stock as the personal property of the shareholders."

11. The court erred in the following part of his opinion, to wit:

"Section 7 imposes upon every national bank located within this Commonwealth which fails to collect and pay said tax of eight mills a tax of four mills upon the actual value of all the shares of its capital stock."

75 12. The court erred in saying:

"The contention is that by the terms of this section of the

act in question some national banks of the State are permitted to elect to pay a less rate of tax than four mills upon each dollar of the actual value of their capital stock, while others are required to pay tax at this rate."

13. The court erred in the following part of his opinion, to wit:

"The want of actual uniformity is, as the findings of fact above referred to show, not greater here than it was in those cases," referring to the cases of Commonwealth *vs.* Delaware Division Canal Co. and Commonwealth *vs.* Brush Electric Light Co., 123 Pennsylvania State and 125 Pennsylvania State respectively.

14. The court erred in that portion of his opinion in which he says:

"The contrast is between national bank shares which are monied capital, and the shares of stock in other institutions and securities of other kinds which are 'other monied capital.'"

15. The court erred in the following part of his opinion, to wit:

"The statute (section 5219 of the Revised Statutes of the United States) does not deal with the question of uniformity of taxation of the shares of different national banks as between themselves, but is simply intended to protect them from taxation at a higher rate than that imposed upon monied capital invested otherwise than in the shares of national banks."

16. The court erred in the following portion of his opinion, to wit:

76 "The corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same."

17. The court erred in his first conclusion of law, to wit:

"That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article 9, section 1, of the constitution of the State of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'"

18. The court erred in his second conclusion of law, to wit:

"That said sections of said act are not in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely, 'that the tax shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State.'"

19. The court erred in his third conclusion of law, to wit:

"That the tax act upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice."

20. The court erred in its fourth conclusion of law, to wit:

"That said taxing act is not in conflict with amendment 14 of the Constitution of the United States, section 1, which (*inter*

77 *alia*) ordains as follows: 'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'"

21. The court erred in directing judgment to be rendered in favor of the Commonwealth.

22. The court erred in not directing judgment to be rendered in favor of the defendant.

HALL & WILSON,
Defendant's Attorneys.

Order Relating to Exceptions and Disposing Thereof.

By the COURT:

The only reason that we did not specifically find as facts the matters stated in exceptions one to four inclusive is, that many of the statements therein contained, especially as to the market value of the shares of stock, were not testified to from personal knowledge, but were obtained by extracts from printed documents; but as the learned attorney general is willing to concede the correctness of these statements, we now find the facts to be as stated in these exceptions.

The matters stated in exception five are merely inferences, which we decline to find as facts.

The matters stated in exception six are matters of inference and calculation from the facts already found, and are not therefore proper subjects for a specific finding.

The matters stated in exceptions seven and nine are matters of law, and not of fact.

We find the facts to be as stated in exception eight.

Exceptions eleven to sixteen inclusive are simply excep-
78 tions to the course of reasoning of the court, and are therefore immaterial.

Exceptions seventeen to twenty-two inclusive are overruled.

In the light of the cases cited in the opinion heretofore filed in this case, it is manifest that the want of uniformity in taxes, which is obnoxious to the mandate of the constitution on this subject, is not a mere want of uniformity in fact. That was found to exist in both these cases, yet the taxes were held to be uniform in the legal sense of that term. It has never yet been declared how great the want of uniformity in fact must be before want of uniformity in law occurs, and it is, we think, significant that this limit has not been reached in any case which has arisen in the twenty years since the constitution was adopted. Under these circumstances we do not feel called upon to attempt any nice discrimination, but content ourselves with following the trend of the authorities as they now stand; and if the point where want of uniformity in fact and in law coincide lies within the limits of this case, the court of last resort will have all the data before it on which to so declare. Judgment is hereby directed to be entered in accordance with the opinion heretofore filed.

J. W. SIMONTON, *P. J.*

Same day exceptions entered for defendant.

J. W. SIMONTON, *P. J.* [SEAL.]

At a supreme court of the State of Penna., sitting in and for the middle district of the said court, at the city of Harrisburg, Penna., on the 21st Monday following the first Monday of January, A. D. 1895.

Present: The Honorable James P. Sterrett, chief justice; Henry Green, H. W. Williams, J. Brewster McCollum, James T. Mitchell, John Dean, and D. Newlin Fell, justices, and William Pearson, prothonotary of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district to May term, *No.* 1895, No. 8, it is contained as follows, to wit:

Docket Entries.

No. 8.

COMMONWEALTH OF PENNSYLVANIA *vs.* THE MERCHANTS' AND MANUFACTURERS' National Bank of Pittsburgh, Pa., Appellant.	Certiorari Surappeal to the Court of Common Pleas of Dauphin County. No. 669. January Term, 1894.

John Wilson, Wm. M. Hall, Jr.

1894, Dec. 18.—Prec., app., aff., & recog. filed. *Eo die*, exit writ of cert., r't'ble *sec. reg.*

1895, Feb. 25.—Record returned and filed.

" *eo die.*—Assignments of error filed.

" April 29.—Record returned and filed.

" *eo die.*—Argued in Philadelphia.

" May 20.—Judgment affirmed. Per Williams, J.

" June 3.—Re-argument refused.

1895, June 12.—Petition for allocatur of writ of error from the Supreme Court of the United States; allocatur of said writ by the Honorable James P. Sterrett, chief justice of the supreme court of the State of Pennsylvania, received and filed.

Citation from said Honorable James P. Sterrett and acceptance of service thereof by J. G. Elkin, deputy attorney general for the Commonwealth, received and filed.

Writ of error bond in the sum of twelve thousand dollars received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON, *Prothonotary.*

80 (*Precipe.*)

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, *vs.* THE MERCHANTS' & MANUFACTURERS' National Bank of Pittsburgh, Defendant Below, Appellant.	Certiorari to the Court of Common Pleas for the County of Dauphin, of January Term, 1894. No. 669.

Issue certiorari to the court of common pleas of the county of Dauphin to bring up record and proceedings in a certain action in said court, No. 669, January term, 1894, wherein Commonwealth of Pennsylvania is plaintiff and M. & M. National Bank is defendant.

JOHN WILSON,
WM. M. HALL, JR.,
Attorneys for Defendant.

Returnable to next term *sec. reg.*

To William Pearson, Esq., proth'y sup. court, middle district.

Endorsement: No. 8. May term, 1895. Supreme court of Pennsylvania, middle district. Appeal of the Merchants' & Manufacturers' National Bank of Pittsburgh, Pa. Precipe for certiorari, appeal, affidavit, and recognizance. Filed in supreme court, middle district, Dec. 18, 1894.

81 (*Appeal & Affidavit.*)

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* THE MERCHANTS' & MANUFACTURERS' National Bank of Pittsburgh, Defendant.	In the Court of Common Pleas of the County of Dauphin, of January Term, 1884. No. 669.

Enter appeal on behalf of the defendant from judgment of the court of common pleas of the county of Dauphin.

JOHN WILSON,
WM. M. HALL, JR.,
Att'ys for Defendant.

To Wm. Pearson, proth'y sup. ct., middle district.

COUNTY OF ALLEGHENY, *ss:*

W. A. Shaw, cashier of the above-named defendant corporation, being duly sworn, saith that the above appeal is not intended for delay.

WILSON A. SHAW.

Sworn to and subscribed this 17th day of Dec., A. D. 1894.
GEO. PEARSON, *Pro.*

82 [Endorsed:] No. 8. May term, 1895. Supreme court of Pennsylvania, middle district. Appeal and affidavit. Commonwealth of Pennsylvania *vs.* The Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., appellant. Filed in supreme court, middle district, Dec. 18, 1894.

83 (*Bond.*)

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA *vs.* THE MERCHANTS' & MANUFACTURERS' National Bank of Pittsburgh. } Appeal from the Court of Common Pleas for the County of Dauphin of January Term, 1894. No. 669.

We, The Merchants' & Manufacturers' National Bank of Pittsburgh, W. A. Shaw, & E. M. Ferguson, severally acknowledge to owe the above-named Commonwealth of Penna. the sum of one hundred ($100) dollars upon condition that the above-named defendant prosecute this appeal with effect, and, if the judgment be affirmed or the appeal be discontinued or nonprossed, that it will pay the debt, damages, and costs adjudged or accruing upon such judgment and all other damages and costs that may be awarded upon such appeal, or else we will do it for —.

MERCHANTS' & MANUFACTURERS' NATIONAL BANK,
By W. A. SHAW, *Cashier.*
WILSON A. SHAW.
EDMUND M. FERGUSON.

Taken and acknowledged this 17th day of Dec., A. D. 1894.
GEO. PEARSON, *Pro.*

84 (*Writ of Certiorari.*)

MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

[Seal of the Supreme Court of Pennsylvania, Middle District.]

We, being willing for certain causes to be certified of the appeal of The Merchants' & Manufacturers' National Bank of Pittsburgh, Pa., from the judgment of the said court in a suit wherein The Commonwealth of Pa. was plaintiff and said appellant was defendant, to No. 669, January term, 1894, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the

middle district of said Commonwealth, on the 21st Monday following 1st Monday of January, 1895, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon what of right and according to our laws of the said State ought.

Witness the Honorable James P. Sterritt, doctor of laws, chief justice of our supreme court, at Harrisburg, the 18 day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the Commonwealth the 118.

WILLIAM PEARSON,
Prothonotary.

85 The record and process, with all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

I certify that recognizance for costs in $100, with W. A. Shaw and E. M. Ferguson as bail, has been duly filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

Endorsement: No. 8. May term, 1895. Supreme court, middle district. Com. of Pa. *vs.* Merchants' & Manufacturers' National Bank of Pittsburgh, appellants. Certiorari. Surappeal to the court of common pleas for the county of Dauphin. Returnable the 21st Monday foll. 1st Mon. of Jan., 1895. "Rule on the appellee to appear and plead on the return day of the writ." N. B.—10 days' notice to the parties or their counsel below necessary to compel an appearance. Filed in court of C. P. Dec. 18, 1894. Filed in supreme court Feb. 25, 1895.

86 *Specifications of Error.*

First. The learned court erred in not sustaining the fifth exception on the part of the defendant. Said exception was in these words:

"5. The court erred in not finding as a fact that the total amount of revenue lost to the State in 1893 by the system of commutation of the tax on shares of stock of national and State banks allowed in section 6 of the act of June 8, 1891, was not less than $50,000, and this sum was at least 10 per cent. of all revenue derived by the Commonwealth from this source of taxation."

Second. The learned court erred in not sustaining the sixth exception on the part of the defendant. Said exception was in these words:

"6. The court erred in not finding specifically as a fact that of the said nine (9) national banks in the city of Pittsburgh above referred to, if they had paid the State tax at the same rate the defendant is assessed,

The Farmers' Deposit National bank would have paid to the State a tax of $8,700 instead of $2,400.

The German National bank would have paid $3,050 instead of $2,000.

The Union National bank would have paid $5,000 instead of $2,000.

The Tradesmen's National bank would have paid $4,240 instead of $3,200.

The First National Bank of Birmingham, Pittsburgh, would have paid $1,200 instead of $800.

87 The Second National Bank of Pittsburgh would have paid $3,540 instead of $2,400.

The Diamond National Bank of Pittsburgh would have paid $1,760 instead of $1,600.

The Pittsburgh National Bank of Commerce would have paid $6,000 instead of $3,000.

The Mechanics' National Bank of Pittsburgh would have paid $4,400 instead of $4,000, and the entire list of fifty-five national banks and twelve State banks aforesaid would have paid upwards of $50,000 more in taxes to the Commonwealth than they did pay."

Third. The learned court erred in not sustaining the ninth exception on the part of the defendant. Said exception was in these words:

"9. The learned court erred in not finding as a fact that the act of June 8, 1891, sections 6 and 7, authorized the taxation of shares of stock of different national banks in the Commonwealth for the year 1893 and thereafter at different rates, allowed different times for the payment of said tax, exempted certain banks from local tax and did not exempt others, provided diverse methods for valuing the shares of stock of members of the same class, to wit, national banks, and authorized a tax in the case of some national banks of eight mills on each dollar of the par value of the shares 'subscribed or issued,' and in the case of other national banks of four mills only on the actual value of all the shares 'issued,' and that the act, as a matter of fact, in the latter class allowed shares of stock 'subscribed' but not 'issued' to be exempt from taxation."

Fourth. The learned court erred in not sustaining the tenth exception on the part of the defendant. Said exception was in these words:

88 "10. The learned court erred in not finding as a conclusion of law that the tax appealed from is made a lien upon the franchise and real and personal property of the bank by section 31 of the act of June 1, 1889, P. L. 437, and that the Commonwealth seeks to collect the said tax as a tax on the 'actual value of the capital stock issued,' and not as a tax 'on the shares of stock as the personal property of the shareholders.'"

Fifth. The learned court erred in not sustaining the sixteenth exception on the part of the defendant. Said exception was in these words:

"16. The court erred in the following portion of his opinion, to wit:

'The corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same.'"

Sixth. The learned court erred in not sustaining the seventeenth exception on the part of the defendant. Said exception was in these words:

"17. The court erred in his first conclusion of law, to wit:

'That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article 9, section 1, of the constitution of the State of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'"

Seventh. The learned court erred in not sustaining the eighteenth exception on the part of the defendant. Said exception was in these words:

"18. The court erred in his second conclusion of law, to wit:

89 'That said sections of said act are not in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely, "that the tax shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State.'"

Eighth. The learned court erred in not sustaining the nineteenth exception on the part of the defendant. Said exception was in these words:

"19. The court erred in his third conclusion of law, to wit:

'That the taxation upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice.'"

Ninth. The learned court erred in not sustaining the twentieth exception on the part of the defendant. Said exception was in these words:

"20. The court erred in his fourth conclusion of law, to wit:

'That said taxing act is not in conflict with amendment 14 of the Constitution of the United States, section 1, which (*inter alia*) ordains as follows: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'"

Tenth. The learned court erred in not sustaining the twenty-first exception on the part of the defendant. Said exception was in these words:

"21. The court erred in directing judgment to be entered in favor of the Commonwealth."

Eleventh. The learned court erred in not sustaining the twenty-second exception on the part of the defendant. Said exception was in these words:

"22. The court erred in not directing judgment to be entered in favor of the defendant."

90 COMMONWEALTH *vs.* THE MERCHANTS' & MANUFACTURERS' National Bank of Pittsburgh, Appellant. } Appeal from the Judgment of the Court of Common Pleas of Dauphin County.

WILLIAMS, *J.*:

The complaint of the appellant is against the inequality of burden existing under the operation of the statute providing for the taxation of national banks. The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them than can stand. Absolute equality of burden is theoretically possible, but it has not been attained in practice in this State.

It is a reasonable presumption that banks are honestly organized, and that each one enters upon its business career with an actual capital exactly equal to the face value of all its shares of stock. A tax levied at any given rate per cent. on the shares would operate for a few months to produce substantially uniform results. But once launched in business each bank is affected by many circumstances and influences that are peculiar to it. One bank may accumulate its earnings in a large surplus fund to be used in the busi-
91 ness of the bank; another may divide its earnings in dividends semi-annually among its stockholders. One bank may be managed with financial skill and economy; another may be conducted in a careless and extravagant manner.

One may be located at an active business centre and have a large line of deposits and discounts; another may be located at an unimportant point, where money is scarce and loans few. These and many other circumstances result in decided success in some cases, in the swallowing up of earnings in expenses in others, and in a positive impairment of capital in some others. The law that operated with practical uniformity of result at first produces noticeable inequality as the results of differences in location and management begin to develop themselves, until results such as are brought to our attention in this case flow from the application of a uniform rate of taxation to the shares of stock at their par value. The inequalities are due to causes which the legislature could not be required to foresee or provide against, and for that reason they cannot be charged to the law. But the appellant complains that the law furnishes two modes and rates for taxing the stock of national banks and denies that this can be constitutionally done. But the State finds it convenient and economical to tax its corporations and collect the taxes through its own proper machinery. To induce the banks to make their returns to the auditor general and to pay their taxes
92 into the State treasury, the State offers an inducement. It proposes to relieve all the banks from local taxation that

elect to pay a certain rate per cent. upon their shares of stock directly into the State treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent., which they pay at one time and one place.

Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the State taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent. differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the State. If they do not it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity which is the result of their own deliberate action they certainly ought not to complain.

Of a want of equality of burden that results from circumstances affecting particular banks and is not produced by the application of the law they cannot complain. We think the learned judge decided this case correctly, and the judgment is now affirmed.

93 In Supreme Court of Pa., Middle District.

COMMONWEALTH
vs.
MERCHANTS' & MANUFACTURERS' BANK.

Motion for Re-argument.

First. As to the ground "that the decision of the court heretofore rendered on May 20th, 1895, seems to have been based upon a fundamental mistake in a matter of fact, to wit, that there is any local taxation whatsoever provided by the laws of the Commonwealth on the shares of stock of national banks, from which national banks electing to pay a tax to the Commonwealth now of eight (8) mills on the par value of their shares of stock purchase exemption or to which local taxation other national banks of the Commonwealth are subject."

Second. As to the ground "because the decision of the court recognizes for the purpose of taxation a system of subclassification among members of the same class, by which system it is elective with the members of the class to which subclass they shall belong."

Third. As to the ground "because the time and opportunity afforded to the appellant for the argument of the case at the special hearing on April 29th, 1895, was utterly inadequate, and the case has therefore never been properly presented to the court."

94 (*Opinion of Supreme Court on Motion for Re-argument.*)

COMMONWEALTH
vs.
MERCHANTS' AND MANUFACTURERS' NAT. BANK OF PITTSBURGH, PA.

We have examined the reasons so earnestly pressed upon our attention for ordering a reargument in this case, but we are not pursuaded the judgment should be disturbed. The appellants have examined the questions with evident care, and their brief shows the industry and learning given to it, but for the reasons stated in the opinion on file the judgment rendered in the court below must stand. PER CURIAM.

95 (*Return to Writ of Error from the Supreme Court of the United States.*)

And now here, on this day, to wit, June 12th, 1895, the said Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held in the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

96 *Petition for Writ of Error.*

To the Honorable James P. Sterrett, chief justice of the supreme court of Pennsylvania:

The petition of the Merchants' and Manufacturers' National Bank of Pittsburgh, Pennsylvania, respectively showeth—

That your petitioner brought suit into the supreme court of Pennsylvania for the middle district, to May term, 1895, No. 8, by writ of certiorari to an appeal from a judgment at No. 669, January term, 1894, in the court of common pleas of Dauphin county, in which suit The Commonwealth of Pennsylvania was plaintiff and your petitioner was the defendant; in which suit also in the said supreme court your petitioner was the appellant or plaintiff in error and The Commonwealth of Pennsylvania was the appellee or defendant in error.

That the said suit in the said court of common pleas of Dauphin

county was an appeal by your petitioner as defendant from an account settled against it by the auditor general and State treasurer of Pennsylvania November 1st, 1893, the same purporting to be for a tax on capital stock of your petitioner for the year 1893, amounting to $4,160, and the said appeal was, by agreement of the parties, tried by the said court of common pleas of Dauphin county without a jury, as provided by the act of assembly of April 22, 1874, and upon the said appeal judgment was entered in favor of the Commonwealth and against your petitioner by the said court of common pleas of Dauphin county for the full amount of the tax, as per the auditor general and State treasurer's settlement
97 aforesaid, to wit, $4,160, together with interest from January 1st to November 22nd, 1894, at 12 per cent. per annum, $401.46, and attorney general's commission of 5 per cent., $208, or total amount of said judgment being the sum of $4,769.46 and costs.

That on the 20th day of May, 1895, the supreme court of Pennsylvania, sitting at Philadelphia, ordered the said judgment to be affirmed; that on May 27th, 1895, your petitioner filed in the said court a petition for a rehearing, and that on June 3rd, 1895, a rehearing was refused; that on the — day of June, 1895, the said judgment was duly entered in the middle district of Pennsylvania aforesaid.

That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That the judgment of the said court is final.

That there is drawn in question in the said case the validity of a statute of the Commonwealth of Pennsylvania, to wit, sections six (6) and seven (7) of the act of June 8, 1891, published in the Acts of the General Assembly of Pennsylvania for the Year 1891, on pages 241 and 242, and an authority exercised under the Commonwealth of Pennsylvania, on the ground that they are repugnant to the Constitution and laws of the United States, and the decision of the said supreme court of Pennsylvania is in favor of the validity of the said statute of Pennsylvania, and that there is also claimed a right of privilege under a statute and the Constitution of the United States and the decision of the courts of Pennsylvania is against the right or privilege specially set up or claimed by your petitioner under the Constitution and a statute of the United
98 States.

That the decision and judgment of the supreme court of Pennsylvania aforesaid were against and contrary to section 5219 of the Revised Statutes of the United States, providing (*inter alia*) that taxation of all the shares of national banking associations located within the State shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the said decision and judgment was also against and in violation of article 14 of the amendments to the Constitution of the United States, so far as the same provides that no State shall deprive any person of property without "due process of law" and so far as the said amendment provides that no

State shall deny to any person within its jurisdiction the "equal protection of the laws."

That the said court of common pleas of Dauphin county and the supreme court of Pennsylvania have and had no jurisdiction over the subject-matter of controversy, but the jurisdiction is by the Constitution and statute laws of the United States vested and cognizable in the Federal courts, and therefore the said proceeding and judgment aforesaid are null and void and contrary to the Constitution and statute law of the United States in the premises.

Your petitioner, therefore, prays for the allowance of a writ of error to the supreme court of Pennsylvania in order that the judgment of the said court may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And it will ever pray, etc.

[Corporate Seal.]

THE MERCHANTS' & MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PA.,
By JOHN WILSON, *Its Attorney.*

99 STATE OF PENNSYLVANIA, } ss:
Allegheny County, }

W. A. Shaw, being duly sworn according to law, deposes and says that he is the cashier & agent for the petitioner in this behalf and that the facts set forth in the foregoing petition are true, as he verily believes. W. A. SHAW.

Sworn to and subscribed before me this 10th day of June, 1895.
G. L. RODGERS,
[SEAL.] *Notary Public.*

100 Endorsement: Copy. No. 8. May term, 1895, S. C., E. D. Appeal of the Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., from the judgment entered in the case in which The Commonwealth of Pennsylvania was plaintiff and the above-named appellant was defendant. Filed in supreme court, middle district, Jun- 14, 1895. Petition for writ of error. And now, to wit, June 12, 1895, citation awarded and writ of error allowed by me. James P. Sterrett, chief justice supreme court of Penna. Copy.

101 In the Supreme Court of Pennsylvania, Middle District.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE MERCHANTS' AND MANUFACTURERS' National Bank of Pittsburgh, Pa., Appellant. } No. 8. May Term, 1895.

Bond and Justifications of Sureties.

Know all men by these presents that we, The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., and Wilson A.

Shaw and George A. Kelley, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of twelve thousand dollars, to be paid to the said Commonwealth of Pennsylvania; to which payment, well and truly to be made, we do bind ourselves, our successors and assigns, and our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

In witness whereof the cashier of the said Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., by resolution of the board of directors, has hereunto affixed the official seal of the said corporation, and the said sureties have hereunto set their hands and seals this 10th day of June, 1895.

Whereas lately, at a court of common pleas in and for the county of Dauphin, judgment was entered against the Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., at the suit of the Commonwealth of Pennsylvania, of January Term, 1894, No. 669, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a certain plea and suit in said court, of May term, 1895, No. 8, and the said Merchants' and Manufacturers'
102 National Bank of Pittsburgh, Pa., having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above-entitled action, and having filed a copy thereof in the office of the prothonotary of the said court for the middle district, and a citation directed to the said The Commonwealth of Pennsylvania, citing and admonishing the said Commonwealth to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., shall prosecute the said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the obligation to be void; else to remain in full force and virtue.

[Seal Mer. & Mfrs.' Nat. Bank of Pittsburgh, Pa.]

MER. & MFRS.' NATIONAL BANK
OF PITTSBURGH, PA.,
By W. A. SHAW, *Cashier.* [SEAL.]
W. A. SHAW. [SEAL.]
GEORGE A. KELLEY. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Approved by—
JAMES P. STERRETT,
Chief Justice of Pennsylvania.

STATE OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

Before me, a notary public in and for said county, personally came Wilson A. Shaw and George A. Kelley, the sureties in the

foregoing bond, who, being sworn according to law, did depose and say, each for himself respectively, as follows, viz:

103 That he, the said Wilson A. Shaw, is the owner of property in the State of Pennsylvania worth over and above all his liabilities more than twelve thousand dollars, and that he, the said George A. Kelley, is the owner of property in the State of Pennsylvania worth over and above all his liabilities more than twelve thousand dollars.

W. A. SHAW.
GEORGE A. KELLEY.

Sworn and subscribed before me this 10th day of June, 1895.
[SEAL.] G. L. RODGERS,
Notary Public.

June 12th, 1895, the foregoing bond and sureties approved.
JAMES P. STERRETT,
Ch. Justice Sup. Court of Pennsylvania.

Endorsed: No. 8. May term, 1895. Commonwealth of Pennsylvania *vs.* The Merchants' and Manufacturers' National Bank of Pittsburgh, Pa., appellant. Filed in supreme court, middle district, June 14, 1895. Bond and justifications of sureties.

104 *Certificate.*

STATE OF PENNSYLVANIA, } *ss:*
County of Dauphin, }

In testimony that the foregoing, contained on pages one to —, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of the State of Pennsylvania, the highest court of law and equity in that State, in the case lately depending therein, to No. 8, May term, A. D. 1895, wherein The Merchants' & Manufacturers' National Bank of Pittsburgh was appellant and The Commonwealth of Pennsylvania was appellee—

I have hereunto subscribed my name and affixed the seal of the said supreme court at Harrisburg this 5th day of July, A. D. 1895.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

[Endorsed:] Commonwealth of Pennsylvania *vs.* Merchants' and Manufacturers' National Bank. Transcript of record.

Endorsed on cover: Case No. 15,950. Pennsylvania supreme court. Term No., 660. The Merchants' and Manufacturers' National Bank of Pittsburgh, Pennsylvania, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed July 17th, 1895.

167-461

APR 2 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 301.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PENNA.,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN WILSON,
JEREMIAH M. WILSON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 301.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURGH, PENNA.,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error prosecuted on behalf of the Merchants' and Manufacturers' National Bank of Pittsburgh, Pennsylvania, to the supreme court of that State, to review the action of said court upon substantially the following state of facts:

1. The Merchants' and Manufacturers' National Bank of Pittsburgh is a national bank, organized under the act of

Congress of the United States approved June 3, 1864, and doing business as such national bank in the said city of Pittsburgh, in the State of Pennsylvania. (*R., p. 34.*)

2. Section 6 of an act of the legislature of the Commonwealth of Pennsylvania of date June 8, 1891 (*P. L., 241*), providing for the taxation of the stock of State and national banks within the Commonwealth, enacts as follows :

"In case any bank or savings institution, incorporated by the State or the United States, shall elect to collect annually from the shareholders thereof a tax of eight (8) mills on the dollar upon the par value of all shares of said bank or savings institution that have been subscribed for or issued, and pay the same into the State treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be exempt from local taxation under the laws of this Commonwealth."

3. Section 7 of said act provides as follows :

"That from and after the passage of this act every national bank located within this Commonwealth which shall fail to elect to collect annually from the shareholders thereof a tax of eight (8) mills on the dollar upon the par value of all the shares of said bank that have been subscribed or issued, shall, on or before the twentieth day of June in each and every year, make to the auditor general a report in writing, verified by the oath or affirmation of the president or cashier, setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of this State, that is to say, at the rate of four (4) mills upon each dollar of the actual value thereof, and for that purpose he shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report, to summon the officers of said national bank to appear before him upon notice so to do on a day to be fixed by him, and to bring with them all the books of the said na-

(Insert the following under paragraph 2, printed page of brief for plaintiff in error, after the words "enacts as follows," the same being the entire section 6 therein referred to:)

"In case any bank or savings institution incorporated by this State or the United States shall elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of all shares of said bank or savings institution that have been subscribed for or issued, and pay the same into the State treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be exempt from local taxation under the laws of this Commonwealth. It shall be the duty of the president or cashier of every *bank or savings institution incorporated by or under the laws of this Commonwealth* failing to pay in the eight-mill tax as aforesaid to make report in writing to the auditor general, on or before the twentieth day of June of each year, stating specifically the amount of capital stock and the amount paid in, a full and complete list of the shareholders of such bank or savings institution with their residences and number and par value of shares of stock held by each person respectively, and the value of said stock in the market where such bank or savings institution is located during the year ending with the twentieth day of June, which said report shall be verified by the oath of the president or cashier, taken before some officer authorized to administer oaths; and the said president or cashier shall also furnish a duplicate original of said report to the commissioners or board of revision of the proper city or county in which such bank or savings institution is located, to be used by them for the purpose of assessing all taxes against said shareholders. The auditor general shall have power to inquire into the value of such stock, and either abate or increase the assessment as may be just. If the said bank officers shall neglect or refuse to furnish the reports aforesaid as above required, it shall be the duty of the auditor general to require the said officers to appear before him in person, with the books and accounts of the said bank or savings institution, for interrogation and examination, and the auditor general shall have power to issue subpœnas and attachments to be served by any constable or

sheriff, and to compel the attendance of such officers and the production of such books and papers as he may deem necessary to make a correct list of the shareholders, with their residence and the number and value of their shares, and the said auditor general shall settle an account in the usual mode against the individual shareholders for the State tax of four mills and proceed to collect the same according to law, and he shall also transmit the list and assessments made by him to the commissioners or board of revision of the proper cities and counties to be used by them in assessing taxes against the shareholders; and any president or cashier of any bank or savings institution neglecting or refusing to furnish the said report, or to do or perform any of the matters and things required of him by this act, shall be liable to a penalty of one thousand dollars; and any bank or savings institution refusing to permit the said president or cashier to make the said reports or to produce its books, as above required, shall be liable to a like penalty of one thousand dollars; and the auditor general may settle an account against the president and cashier so neglecting or refusing to make report as aforesaid, or against the bank or savings institution refusing to permit the making of said report or the production of its books and papers as aforesaid, and proceed for the collection of said penalties for the use of the Commonwealth in the same manner as taxes are now recoverable by law."

tional bank, showing its business, assets and dividends, for his examination; and it shall be his further duty to hear any stockholder who may desire to be heard on the question of the valuation of the shares as aforesaid; and he shall have the right by other evidence to satisfy himself as to the correctness of the valuation of said shares of stock in said report contained, and to correct said valuation. The auditor general shall thereupon transmit to the said national banks a statement of the valuation and assessment so made by him, and the amount of tax due the Commonwealth on all of said shares, which tax the said banks shall, within thirty days after receiving said statement, collect from their shareholders and pay over into the State treasury: *Provided*, That if any national bank shall fail or refuse to make said report, or to pay said tax at the said times herein specified, or shall make any false statement in said report, or shall fail or refuse by its officers to appear before the auditor general upon notice as aforesaid, or shall fail or refuse to produce its books for examination when required to do so, the auditor general, after having ascertained the actual value of each share of the capital stock of said national bank from the best information which he can obtain, shall add thereto fifty per centum, assess the taxes as aforesaid, and proceed according to law to collect the same from said bank."

4. Thereafter plaintiff in error reported, as required by the provisions of said section 7, above quoted, to the auditor general of the Commonwealth that the whole number of the shares of its capital stock was 16,000; that the actual value of each of said shares of stock was $65, and that the actual value of the capital stock issued was $1,040,000. (*R., p. 35.*)

5. On this valuation of capital stock the said auditor general thereafter, on the 18th of November, 1893, settled an account, approved by the State treasurer, charging said bank with a tax of four mills on each dollar of said actual value, amounting, in the aggregate, to $4,160 (*R., p. 35*), and from said settlement an appeal was taken by said bank, December 28, 1893, to the court of common pleas of Dauphin

county, in said State, as provided by law, and which latter court thereafter, on the 23d of October, 1894, affirmed said account as settled by the auditor general, and entered judgment against said bank in favor of the Commonwealth in said sum of $4,160, together with interest thereon from January 1 to November 22, 1894, at the rate of 12 per cent. per annum, $401.46, and attorney general's commission, $208, making an aggregate of $4,769.46. (*R., p. 40.*)

6. Thereafter the said bank took an appeal from said judgment of the court of common pleas to the supreme court of the State, which latter court, on the 20th of May, 1895, in all things affirmed the judgment of said court of common pleas, and thereupon the cause was removed by writ of error to this Court.

7. The said court of common pleas of Dauphin county found the facts as follows:

1. Defendant is a national bank organized under the act of Congress of June 3, 1864, and doing business in the city of Pittsburgh, Pennsylvania. Its cashier reported, as required by section 7 of the act of June 8, 1891 (*P. L., 242*), to the auditor general that the whole number of shares of its capital stock issued was 16,000; the actual value of each share, $65; and the actual value of capital stock issued, $1,040,000. On this actual value of capital stock issued the auditor general and State treasurer settled an account November 18, 1893, charging defendant with a tax of 4 mills on each dollar of said actual value, amounting to $4,160; and from said settlement this appeal was taken December 28, 1893.

2. There were in the city of Pitttsburgh during the year 1893 twenty-seven national banks, chartered under the same act of Congress and doing the ordinary and general business of a national bank as was defendant, the aggregate par

value of whose shares of capital stock was $11,200,000, its actual market value being largely in excess of the par value, and estimated at $21,226,875.

3. There were in the State of Pennsylvania during said year of 1893 about 336 national banks, doing the same kind of business as defendant, the aggregate par value of whose shares of capital stock was about $72,000,000, its market value being much greater and estimated at about $128,000,000.

4. Nine of the said twenty-seven national banks doing business in the city of Pittsburgh in 1893, having capital stock of the par value of $2,800,000, elected to collect from their shareholders for the year 1893 a tax of 8 mills on the dollar upon the par value of their shares, as provided by section 6 of the act of June 8, 1891. The actual value of all the shares of said banks was more than three times the par value, and the amount of tax paid by said banks was, therefore, much less than it would have been if they had paid 4 mills on the actual value of all their shares.

5. There were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, a number of State banks whose entire capital stock at par amounted to $8,461,559, and, as reported by them to the superintendent of banking, their total capital, surplus funds, and undivided profits amounted to $14,321,350, and the market value of their shares to $16,000,000, and a number of these, whose aggregate capital amounted to not less than 12 per cent. of all the moneyed capital invested in shares in State banks of Pennsylvania, by electing to pay the 8 mills under said section 6 paid a less amount of tax than they would have paid if they had been taxed at the rate of 4 mills upon the actual value of all their shares.

6. The total actual or market value of shares of stock of the nine national banks located in the city of Pittsburgh and referred to in the court's fourth finding of fact was $9,427,500. The rates paid by the said nine national banks upon each dollar of the actual value of their shares of stock are shown in the accompanying table, as well as the par and actual values of the shares and the total amount of tax paid by the said nine national banks:

	Capital at par.	Actual value.	Millage rate on actual value.	Amount paid.
Farmers' Deposit National..	$300,000	$2,175,000	1.11	$2,400
German National	250,000	762,500	2.62	2,000
Union National	250,000	1,250,000	1.60	2,000
Tradesmen's National	400,000	1,000,000	3.20	3,200
First National, Birmingham.	100,000	300,000	2.66	800
Second National, Pittsburgh.	300,000	900,000	2.66	2,400
Diamond National.....	200,000	440,000	3.64	1,600
Pittsburgh National Bank of Commerce	500,000	1,500,000	2.66	4,000
Mechanics' National.....	500,000	1,100,000	3.60	4,000
	$2,800,000	$9,427,500	2.36*	$22,400

*Average.

And the average rate of taxation paid by the said nine national banks in the city of Pittsburgh for 1893 upon the actual value of their shares of stock "subscribed for or issued" was the rate of 2.36 mills on each dollar. (See exception No. 1 to findings of fact, R., pp. 40, 41, and order of court adopting same as a finding, *R., p. 45.*)

7. The entire number of national banks doing business in the State of Pennsylvania—fifty-five national banks—having capital stock of a par valuation of $12,307,220 and a total actual valuation of at least $35,882,928, were taxed

by the Commonwealth, for the year 1893, at an average rate of 2.86 mills upon each dollar of the actual valuation of the shares of their capital stock issued. These banks elected to pay an 8-mill tax on the par value of their shares subscribed for or issued under said section 6 of the act of June 8, 1891, which election was also open to defendant. An election to pay a taxation of 8 mills on the par value of all the shares of its stock under such section would have been an election to pay a tax on 6.2 on each dollar of the actual or market value of its shares. (See exception No. 2 to findings of fact, R., p. 41, and order of court adopting same as a finding, *R., p. 45.*)

8. The following State banks of deposit and discount chartered by the Commonwealth, and in business competition with the national banks of the Commonwealth, were taxed by the Commonwealth, for 1893, at a less rate than the defendant is taxed, to wit:

The German Savings and Deposit Bank of Birmingham, Pittsburgh, being taxed at the rate of 3.2 mills on each dollar of the actual value of its shares of stock.

The Pittsburgh Bank for Savings of Pittsburgh, at a rate of 3.2 mills.

The Farmers' Bank of Carlisle, at a rate of 3.4 mills.

The Hanover Savings Society of Hanover, at a rate of 3.2 mills.

The People's Bank of McKeesport, at a rate of 3.6 mills.

The Warren Savings Bank of Warren, Pennsylvania, at a rate of 2.7 mills.

The Savings Institution of the City of Williamsport, at the rate of an eighth of a mill.

That the average rate paid by the aforesaid State banks was 2.9 mills on each dollar of the actual value of their shares of stock. The Butler Savings Bank of Butler, the City Deposit Bank of Pittsburgh, the Miners' Savings Bank of Pittston, the Miners' Savings Bank of Wilkesbarre, the

Shrewsbury Savings Institution of Shrewsbury were taxed and paid taxes at a less rate than 4 mills on the actual value of their shares of stock. (See exception No. 3 to findings of fact, R., pp. 41, 42, and order of court adopting same as a finding, *R., p. 45.*)

9. Not only at least 12 per cent. of all moneyed capital in the State of Pennsylvania, in the hands of individual citizens thereof, invested in the shares of State banks located therein, was taxed, in 1893, at a less rate than 4 mills on each dollar of the actual value thereof, but also at least 27.3 per cent. of all moneyed capital in the hands of citizens thereof and invested in the shares of stock of national banks in Pennsylvania were taxed, in 1893, at a less rate than 4 mills on each dollar of the actual value thereof, and more than 39 per cent. of all moneyed capital in the hands of individual citizens of the State of Pennsylvania invested in the shares of stock of national banks in the city of Pittsburgh, directly in competition with defendant, were taxed at a less rate than 4 mills on each dollar of the actual value thereof during the year 1893. (See exception No. 4 to findings of fact, R., p. 42, and order of court adopting same as a finding, *R., p. 45.*)

10. Under the said Pennsylvania system of taxation, in the towns of Bloomsburg, Braddock, Bristol, Brownsville, Chester, Clearfield, Connellsville, Doylestown, Erie, Harrisburg, Johnstown, Lebanon, Lewisburg, Lock Haven, Marietta, Media, Minersville, New Castle, Newton, Pennsburg, Quakerstown, Reading, Scranton, Uniontown, Warren, and Wellsboro', in certain of them all, the moneyed capital invested in the shares of stock of national banks located therein was taxed by the Commonwealth at a less rate than 4 mills upon each dollar of the actual value thereof, and in certain others of them, such as Scranton, Reading, Harrisburg, New Castle, and others, in which more than one na-

tional bank is located, the greater portion of the capital invested in the shares of stock of national banks located therein is taxed at a less rate than the balance, and this fact is a disadvantage to the moneyed capital invested in the shares of national banks thus discriminated against. (See exception No. 8 to findings of fact, R., p. 43, and order of court adopting same as a finding, *R., p. 45.*)

Upon said findings of fact the said court thereupon entered its conclusions as follows:

We therefore conclude:

1. That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article IX, section I, of the constitution of the State of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

2. That said sections of said act are not in conflict with the condition upon which the several States are permitted to tax shares of stock in national banks, namely, "that the tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

3. That the taxing act upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice.

4. That said taxing act is not in conflict with amendment XIV of the Constitution of the United States, section I, which (*inter alia*) ordains as follows:

"Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

ASSIGNMENT OF ERRORS.

The assignment of errors is set forth in the record (pages 3–6, inclusive), reference to which is hereby made.

The judgment sought to be reviewed herein is erroneous in this:

1. That the same purports to be based upon an act of the legislature of Pennsylvania providing a system for the taxation of the shares of stock of national and State banks within said Commonwealth, and which said system of taxation is unconstitutional and void, in that it results, in its operation, in a lack of uniformity upon the same class of subjects, to wit, the shares of stock of national banks within said State.

2. That the same violates the acts of Congress of 1864 and 1868, regulating the taxation of shares of stock of national banks, in this: that it levies upon said banks a tax at a greater rate than is levied upon other moneyed capital in the hands of individual citizens of said State, said moneyed capital being invested in the shares of stock of other national and State banks in competition with plaintiff in error.

3. That section 5219, Revised Statutes of the United States, directs that the State shall assess the shares of stock of national banks as the "personal property of the shareholders" thereof, and the fourteenth amendment of the Constitution of the United States directs that property shall be taken only by "due process of law." The tax herein is assessed against the bank itself, and the same is made a lien on the franchise or the property of the bank, no notice whatever of the assessment being given to the shareholder, or required by the act; that said tax is levied against the bank, the shareholder has no notice of it, and the said taxation results in

the taking of the property of the shareholder without "due process of law."

4. That because of the lack of uniformity and of the inequality resulting from said system of taxation of shares of stock of national banks, the fourteenth amendment of the Constitution of the United States is further violated, in this: that there is denied to the shareholders of stock of national banks the "equal protection of the laws."

5. That said judgment is further erroneous, in this: that it sustained and confirmed in all things the conclusions entered by the court of common pleas of Dauphin county, numbered from 1 to 4, inclusive, upon and under the findings of fact. (R., p. 40.)

6. That said judgment of affirmance by the supreme court of the State of Pennsylvania was in favor of the Commonwealth of Pennsylvania and against the plaintiff in error, whereas, by the law of the land, the judgment of the court of common pleas of Dauphin county ought to have been reversed, and the appeal of said plaintiff in error ought to have been sustained.

7. Other errors appearing upon the face of the record and proceedings had herein.

BRIEF.

1.

THE ACT OF THE LEGISLATURE OF PENNSYLVANIA UNDER WHICH THE TAX HEREIN WAS ASSESSED AND LEVIED IS UNCONSTITUTIONAL AND VOID, IN THIS: THAT IT RESULTS IN A LACK OF UNIFORMITY OF TAXATION UPON THE SAME CLASS OF SUBJECTS, TO WIT, THE SHARES OF STOCK OF NATIONAL BANKS WITHIN SAID STATE.

The constitution of the State of Pennsylvania, article IX, section 1, provides that—

"All taxes shall be uniform upon the same class of subjects within the territorial limit of the authority levying the tax."

Section 6 of the said act of June 8, 1891, above referred to, in substance provides that any bank or savings institution incorporated by said State or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders and pay into the State treasury a tax of 8 mills on the dollar on the par value of all its shares that have been *subscribed for* or *issued*.

Section 7 of said act in substance provides that any national bank that fails to collect and pay said tax of 8 mills, as required by said section 6, shall pay a tax of 4 mills upon each dollar of the actual value of all shares of its capital stock that have been *issued*.

In other words, said system of taxation is one providing for the taxation, at its par value, of all shares of stock *subscribed for* or *issued*, at the rate of 8 mills on the dollar, in the case of some banks (section 6, *supra*), and only the

shares *issued*, at the rate of 4 mills upon each dollar of the actual value thereof, in the case of others (section 7, *supra*).

Such a system of taxation is necessarily lacking in uniformity upon the same class of subjects:

(*a.*) *In the rate levied; in the time of payment of the tax; in the promise of an exemption of certain members of the class from local taxation and in not promising exemption to others; in the diverse methods of valuation of the shares of stock of different national banks, and in taxing the shares "subscribed for or issued" in the case of some banks and only the shares "issued" in the case of others.*

The above particulars in which said act lacks uniformity of taxation upon the same class of subjects appear upon the face of the act itself.

An inspection of said sections 6 and 7 will disclose that the scheme or system of taxation therein provided for authorizes the taxation of shares of stock of different national banks at materially different rates; provides diverse methods of valuing the shares of stock of members of the same class, to wit, national banks; authorizes a tax of 8 mills on each dollar of the *par* value of shares "*subscribed for or issued*" in the case of some national banks and of 4 mills only on the *actual* value of all shares "*issued*" in the case of other national banks, and in the latter case, as a necessary result, exempts altogether the shares of stock subscribed but not issued from taxation, and also provides different times of payment of taxes as between such national banks.

(*b.*) *In the gross inequality and diversity of burden and results.*

The inevitable result of such a system of taxation is to enable national banks, the *actual* value of whose shares is more than double the *par* value of their shares, to pay a lower rate of taxation upon the actual value of their

shares than other national banks, as, for example, the plaintiff in error, the actual value of whose shares is less than double the par value thereof, on which a tax is levied of 4 mills upon each dollar of said *actual* value.

This discrimination is self-evident and establishes itself beyond argument upon a reading of the language of the act itself.

The findings of fact herein, Nos. 2–10, inclusive, above set forth, disclose the gross inequality of the burden and tax resulting from the practical operation of said system of taxation.

As an illustration of this inequality, take, for example, the case of the Farmers' Deposit National Bank of Pittsburgh, a national bank, and in immediate competition with plaintiff in error.

Said bank has a capital stock of the *par* value of $300,000 and of the *actual* value of $2,175,000. It was assessed and paid the sum of $2,400, being a millage rate of but 1.11 on each dollar of the *actual* value of its capital stock (R., p. 41). In other words, while its capital stock was of the actual value of $2,175,000, its par value was but $300,000, and it accordingly elected to pay a tax of 8 mills on the dollar upon the par value of all shares of said bank subscribed for or issued under the provisions of said section 6, above referred to.

The plaintiff in error was assessed and taxed at the rate of 4 mills on the dollar upon each dollar of the actual value of its capital stock issued, or $1,040,000, at 4 mills, amounting to $4,160. (R., p. 7.)

In short, the Farmers' Deposit National bank, having a total "book value" of its shares of $1,331,853 (R., p. 14), was assessed and paid a tax of but $2,400, and thereby has escaped all other (local) taxation except real estate, while plaintiff in error, having a total "book value" of its shares of $1,116,329 (R., p. 7), has been assessed and taxed $4,160 as a State tax and has not escaped local taxation.

The said Farmers' Deposit National bank, taxed at the same rate as plaintiff in error in the case complained of, would have paid to the State a tax of $8,700, whereas it, in fact, was assessed and paid but $2,400.

Nine national banks located in the city of Pittsburgh were assessed and paid a tax ranging from 1.11 to 3.60 mills on each dollar of actual value of stock issued, or an average of 2.36 mills on each dollar of actual value of stock issued (see table, *R., p. 41*), while plaintiff in error was assessed and taxed at the rate of 4 mills on each dollar of actual value of stock issued.

At least 12 per cent. of all moneyed capital in the said State, in the hands of individual citizens thereof, invested in shares of stock of State banks located therein, was taxed, in 1893, at a rate of less than 4 mills on each dollar of actual value thereof; at least 27.3 per cent. of all moneyed capital in the hands of citizens thereof and invested in shares of stock of national banks of said State were taxed, in 1893, at a less rate than 4 mills on each dollar of the actual value thereof, and more than 39 per cent. of all moneyed capital in the hands of individual citizens of said State, invested in shares of stock of national banks in the city of Pittsburgh, directly in competition with the plaintiff in error, were taxed at a less rate than 4 mills on each dollar of the actual value thereof during the year 1893. (*R., p. 42.*)

This system, as will appear from the record, for the year 1893 alone, enabled $9,427,500 worth of stock in national banks in the city of Pittsburgh to pay, in full of all taxes, an average rate of 2.36 mills on each dollar of the actual value thereof, and some of said stock paid as low rate of tax as 1.14 mills on each dollar thereof.

It further enabled $35,882,928 worth of stock in said State to pay taxes at an average rate of 2.86 mills on each dollar thereof.

It enabled about $2,000,000 worth of stock in State banks

to pay much less than 4 mills on each dollar of the actual value thereof.

We will not pursue this particular branch of the case further; but, from what has been referred to, it is demonstrated beyond the possibility of a doubt that the system of taxation provided for in said act of the legislature of Pennsylvania results in gross inequality of burden and tax, not imaginary, but real and substantial.

WHAT IS THE UNIFORMITY OF TAXATION UPON THE SAME CLASS OF SUBJECTS REQUIRED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES AND BY THE CONSTITUTION AND LAWS OF THE STATE OF PENNSYLVANIA?

The rule of equality and uniformity provided for in the Constitution of the United States has become, as has been remarked by Justice Miller in his late work on the Constitution, page 239, nearly universal in the constitutions of the States. The following, taken mainly from the constitutions contained in the late work entitled "Charters and Constitutions—The United States," published by authority of the United States Senate, are the operative words of the State constitutions controlling this matter of equality and uniformity in levying and assessing taxes:

Alabama: "Taxed at the same rate."
Arkansas: "Equal and uniform."
California: "Equal and uniform."
Colorado: "Uniform upon the same class of subjects."
Florida: "Equal and uniform mode."
Georgia: "Uniform on all species of property."
Illinois: "Uniform in respect to persons."
Indiana: "Uniform and equal rate."
Iowa: "General and uniform."
Kansas: "Uniform and equal rate."
Louisiana: "Equal and uniform."
Maine: "Apportioned and assessed equally."
Maryland: "According to actual worth."

Massachusetts: "Proportional and reasonable." (118 Mass., 389.)
Michigan: "Uniform rule."
Minnesota: "Equalized and uniform."
Missouri: "Uniform on same class."
Nebraska: "Uniform as to the class."
Nevada: "Uniform and equal rate."
New Hampshire: "Proportional and reasonable." (60 N. H., 219.)
New Jersey: "Uniform rules according to value." (48 N. J. L., 246–'79.)
North Carolina: "Uniform rule."
Ohio: "Uniform rule."
Oregon: "Uniform and equal rate."
Pennsylvania: "Uniform on the same class of subjects."
South Carolina: "Uniform and equal rate."
Tennessee: "Equal and uniform."
Texas: "Equal and uniform."
Virginia: "Equal and uniform."
West Virginia: "Equal and uniform."
Wisconsin: "Uniform."

We find no provisions in the constitutions of New York, Vermont, and Rhode Island relating to this matter of equality in taxation. We may, however, have overlooked them.

It is thus seen how nearly universal in the constitutions of the States is this provision in favor of uniformity in the distribution of Government burdens and how supreme is the importance (in so far as it shall become authority as to the meaning of the word "uniform" when found in such constitutional guarantees) of the decision of this Court in this case and upon the requirements of that word.

Let this Court hold that as between the tax-payers respectively and the State as to the rate or amount of tax imposed upon persons and things of the same class no uniformity is required, and that therefore the legislature is at liberty to select from citizens of the same class and in all respects in the same conditions such persons as it may arbitrarily choose to select, and to impose upon these persons so

selected twice, thrice, or ten times the amount imposed upon others of the same class, then this decision will expunge from the constitutions of all these States this supremely important and most just guarantee of equality of taxation, as in favor of all the people alike, and will overthrow all the adjudications in those States, interpreting the words of their constitutions, respectively, as establishing uniformity and equality, and as requiring that all the people of these States, respectively, who are of the same condition and class, shall equally bear the burdens of their government.

Look, for a moment, at the character and universality of these adjudications by the courts of the States interpreting these requirements of uniformity and equality of taxation.

In Alabama it was held in the case of *Board of Assessment v. Railroad Co.* (59 Ala., 551) that it is not competent for the legislature, under a constitutional provision requiring taxation proportionate to value, to declare an arbitrary or artificial value to the property of individuals or corporations and to assess taxes on such valuations, and statutes to that effect are void.

In Arkansas it was held that the constitutional provision requiring equal and uniform taxation throughout the State rendered void the provisions of a city charter which undertook to exempt the property of the inhabitants from taxation for the construction of roads in the county of which the city formed a part. (*Fletcher v. Oliver*, 25 Ark., 289.)

In California the provision of the constitution required taxation in proportion to value, and required equality and uniformity, and it was held that whatever basis of taxation was adopted exempting the property falling within the class was forbidden (*People v. Railway Co.*, 35 Cal., 606); also that the requirement of uniformity would be violated by a city ordinance imposing a higher fee upon a merchant selling goods by sample, but not bringing his stock within the corporate limits, than upon one who kept his stock there. (*Ex parte Frank*, 52 Cal., 608.)

In the Colorado constitution the provision requiring that all taxes shall be uniform upon the same class of subjects is one which forbids exemptions, with the exception of certain of them which are specified. Under these provisions a statute which relieves real estate in cities and villages for road purposes and makes no provision for taxation for street purposes is unconstitutional. (*Gunnison v. Owen*, 7 Col., 467.)

A provision in the Georgia constitution requiring that all taxation shall be uniform on the same class of subjects is one which compels the same tax to be levied on all members of the class taxed. (*Cutliff v. Albany*, 60 Ga., 597.)

In Illinois the constitutional requirement that taxes should be levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, was held in *Hunsaker v. Wright* (30 Ill., 136–148) to have been inserted in the fundamental law for the purpose of insuring equality in the levying of taxes to support the Government, whether levied for State, county, or municipal purposes.

The design was to impose an equal proportion of these burthens upon all persons within the limits of the district or body imposing them, and in *Bureau Co. v. Railway Co.* (44 Ill., 229), also in *Primm v. Belleville* (59 Ill., 142), it was held that property of railroads could not be disfavored, and that these provisions precluded discrimination in favor of or against any class of persons whatsoever, and that therefore personalty or improvements on realty cannot be favored in taxation.

See to the same general effect 12 Ill., 138; 25 Ill., 458; 58 Ill., 456; 55 Ill., 357; 68 Ill., 530; 97 Ill., 385; 76 Ill., 476, and 76 Ill., 11.

In *Bright v. McCullough* (27 Ind., 223) it was held that a tax for general purposes could not be levied on one species of property only, and therefore that a specific tax on land

by the acre for highway purposes without taxing personalty was void, under the constitutional provision requiring that tax laws should provide a uniform and equal rate of assessment.

The constitutional provision in Louisiana requiring that taxation should be equal and uniform throughout the State precludes a city from imposing a license, tax, or revenue, under the police power, on those bringing garden products of their own raising within it for sale (*State v. Blazer*, 36 La. Ann., 363). It also precludes a specific tax on property not of uniform value, as on cotton by the pound. (*Simms v. Jackson*, 22 La. Ann., 440; *Mfg. Co. v. New Orleans*, 31 La. Ann., 440; *New Orleans v. Ins. Co.*, 28 La. Ann., 756.)

The constitutional provision in the constitution of Maine which required all taxes upon real and personal property to be apportioned and assessed equally according to its just value prohibits the legislature from empowering municipal corporations to exempt the property of manufacturing companies from taxation, and also prohibits it from authorizing a tax for general purposes upon a part only of the property within the municipality (*Brick Co. v. Brewer*, 62 Me., 62; *Dyer v. Farmington*, 70 Me., 515). The bill of rights of that State requiring every person in the State to contribute his proportion of public taxes according to the actual worth of his property prohibits the legislature from levying on coal-mining companies a specific tax of so much per ton on all coal transported by them for sale, and from making this in lieu of other taxation.

The requirement of the Minnesota constitution that property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State precludes the imposition of a tax exclusively on one subdivision of the State to pay a claim or indebtedness which is not peculiarly the debt of such subdivision or to raise money for any purpose not peculiarly beneficial to such subdivision. (*Sanburn v. Rice*, 9 Minn., 258.)

In Mississippi the requirement that taxation shall be equal and uniform throughout the State renders unconstitutional a provision establishing a docket fee in a single judicial district only. (*Murray v. Lehman*, 61 Miss., 283.)

The constitutional requirement in Missouri that taxation shall be uniform requires that municipal taxation must be equal and uniform as respects the subjects of taxation within it. (*Adams v. Lindell*, 5 Mo. App., 197; *State v. Railroad Co.*, 75 Mo., 208.)

Under the constitutional provision of New Hampshire requiring taxes to be proportional and reasonable it is held that a tax of 2 per cent. on gross receipts of express companies doing business upon railroads or, in lieu thereof, $5 per mile for the number of miles of railway over which the business is done, thus impliedly exempting from its scope the business not done upon the railroad, is not valid because not founded in equality and justice. (*State v. Express Co.*, 60 N. H., 219.)

The attention of the Court is particularly asked to the decision in this New Hampshire case, just referred to, as enforcing the proposition contended for by us herein with respect of uniformity and equality of taxation.

In the case of *Morford v. Unger* (8 Iowa, 82) the question was whether it was competent for the legislature to extend the limits of a town to include property deriving no benefit from the municipal government, and thus subject such property to the burdens of municipal taxation. The court held that this was not taxation, but the taking of private property for public use without compensation.

In the State of Kansas the constitution requires uniformity in matters of taxation. It was held in the case of *Graham v. Commissioners* (31 Kansas, 473), opinion by Brewer, J., that this provision required that if taxes were imposed upon personal property brought into the State after a certain date they should be imposed upon all property of that class—that it was not competent for the legislature to pick out a

special kind of property which had been brought in and tax that alone.

The case of the *State v. Cumberland* (40 Md., 22) holds that under the bill of rights in force in Maryland a tax of 2 cents a ton upon coal transported out of the State was unconstitutional, Justice Alvey saying that the tax "is not assessed "with reference to any uniform value of the coal nor with "reference and in conformity to any rate of taxation im- "posed upon the other property of the State. It is, therefore, "a specific, arbitrary tax levied for the support of the govern- "ment on a part of the personal property of the State, with- "out regard to value, uniformity, or equality."

The constitution of Massachusetts provides that taxation in that State shall be "proportional and reasonable," and in the case of *Cheshire v. Commissioners* (118 Mass., 386–'9) it was held that "no enactment respecting taxation under this "clause conforms to its provisions if it directly and neces- "sarily tends to disproportion in assessment." See also the cases of *Ins. Co. v. Commonwealth* (133 Mass., 162); *Fall River v. County Commissioners* (135 Mass., 567), and *Northampton v. Commissioners* (145 Mass., 108).

In New Jersey the constitution provides that property be assessed for taxes under general laws and by uniform rules, according to its true value. In the case of *State v. Township of Redington* (36 N. J. L., 66) it was held that "a tax which "is in excess of an equal apportionment among the persons "or property of the class of persons or kind of property "subject to the taxation is to the extent of such excess the "taking of private property for public use without compen- "sation." See also *State v. Mayor of Newark* (37 N. J. L., 421); *Board of Assessors v. Central Railroad Co.* (48 N. J. L., 146).

The supreme court of Pennsylvania, in *Kitty Roup's Case* (81 Pa. St., 211), held that "all taxes should be uniform upon the same class of subjects," and that this provision of the State constitution is merely declaratory of the common

law; and in *Fox's Appeal* (112 Pa. St., 353) it is held that "the power of the State is conceded to select its subjects for taxation, * * * but this tax, upon whatever laid, must be *uniform*. It must be laid upon all tax-payers alike."

So in the case of *McBean v. Chandler* (9 Heisk., Tenn., 349) the court cites with approval Judge Cooley's statement of the rule that the general feature of taxation or of a public burden that may be imposed as such is that "the tax must "be laid according to some rule of apportionment, not "arbitrary or by caprice, but so that the burden may be "made to fall with something like impartiality upon the "persons or property upon which it justly and equitably "should rest. Equality is of the very essence of the power "itself, and, though absolute equality and absolute justice "are never attainable, some rule tending to that end is in- "dispensable." (*People v. Board* (9 Am. Law Reg., 488.)

The same thing in effect is held in the case of *Norris v. City of Waco* (57 Texas, 741).

The provision in the constitution of North Carolina requiring that all taxes levied by any county, town, or township shall be uniform and *ad valorem* upon all property in the same class, except property exempted by the constitution, prohibits the exemption of the stock in trade of merchants from taxation when real estate is taxed. (*Wilson v. Charlott*, 74 N. C., 748.)

The foregoing citation from the decisions of the highest courts of some of the States presents a striking indication of the condition of the judicial mind of this country securing "equality under the law" to the citizens of the United States and of the States in regard to the equal distribution by fundamental law of the burdens of government upon and amongst all the people.

This condition of judicial unanimity of opinion is remarkable because of the universality of these decisions, embracing, as they do, substantially all the States of the Union; also because of the fact that, so far as we have been able to

find, there is not a single dissenting adjudication; because of the fact that these adjudications are based largely, indeed generally, on the same word as that employed in the Constitution of the United States, to wit, "uniform," and because said decisions unanimously hold that uniformity of taxation of things in the same class and conditions is impossible where there is an absence of uniformity in the modes of assessment for taxation or in the rate per cent. assessed, and that both of these rules of uniformity must be present in order to satisfy the constitutional requirement that taxes shall be "uniform."

It is unanimously held that a law which departs from this rule of uniformity is *void* and cannot be enforced.

Hylton v. United States (3 Dallas, 171) was the first case presented to the Supreme Court involving any of the clauses of the Constitution as to taxation. Mr. Justice Patterson said (pp. 176, 180):

"The question occurs, How is such tax to be laid uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. * * * *The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case the object and the sum coincide, the rule and the thing unite, and, of course, there can be no imposition.* * * * Uniformity is an instant operation on individuals, without the intervention of assessments or any regard to States, and is at once easy, certain, and efficacious."

In *McCulloch v. Maryland* (4 Wheaton, 316, 435) Chief Justice MARSHALL used the following language:

"The people of all the States and the States themselves are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States they tax their constituents, and these taxes must be uniform."

In *Gibbons v. Ogden* (9 Wheaton, 1, 201) Chief Justice MARSHALL, referring to the power of Congress in this regard, said:

"We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: 'Congress shall have power to lay and collect taxes, duties, imposts, and excises;' and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts, and excises *shall be uniform.*"

In *Ogden v. Saunders* (12 Wheaton, 213, 274) Mr. Justice JOHNSON, in the consideration of the question whether a State could establish a bankrupt law, discussed the power of Congress to "establish uniform laws on the subject of bankruptcies throughout the United States," and said:

"Yet, on this subject, the use of the term *uniform*, instead of *general*, may well raise a doubt whether it meant more than that such a law should not be *partial*, but have an equal and *uniform* application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the Constitution are conceived."

In *Gilman v. Sheboygan* (2 Black, 510, 516, 517) it appeared that the constitution of Wisconsin prescribed that the rule of taxation should be uniform, and taxes should be levied upon such property as the legislature should prescribe. The Court (SWAYNE, J.) held that this meant that all kinds of property not absolutely exempt must be taxed alike by the same standard of valuation equally with other taxable property *and* coextensively with the territory to which it applies. It quoted, with approval, the language of the supreme court of Wisconsin in *Knowlton v. Supervisors* (9 Wis., 410), viz:

"The provision of the Constitution that taxes shall be levied upon such property as the legislature shall prescribe does not sanction 'a discrimination which provides for taxing a particular kind of property for the support of government

by a different rule from that by which other property is taxed, *for when the kind of property is prescribed the rule of taxation must be uniform*'" (p. 516).

In *United States v. Singer* (15 Wall., 111, 121) Mr. Justice FIELD said:

"The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation—THAT IS, IT IS ASSESSED EQUALLY UPON ALL MANUFACTURERS OF SPIRITS, WHEREVER THEY ARE. *The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.*"

In *Township v. Talcott* (19 Wall., 666, 675) Mr. Justice SWAYNE, in referring to the constitution of Michigan, used the following language:

"The eleventh clause of the same article declares that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed by different rules. All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies."

In *The Head Money Cases* (112 U. S., 580, 594) Mr. Justice MILLER said:

"The tax is uniform when it operates with the same force and effect in *every* place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is *uniform* AND operates precisely alike in every port of the United States where such passengers can be landed."

In re Deckert (2 Hughes, 183, 185) the court considered the effect of the provision that "Congress has power to establish uniform rules of bankruptcies throughout the United States" (article 1, section 8). It said (WAITE, C. J.):

"A bankrupt law, therefore, to be constitutional must be uniform. Whatever rules it prescribes for one it must for all. It must be uniform in its operations, not only within a State, but within and among all the States."

To the same effect is *Sweatt v. Railroad Co.* (3 Clifford, 339, 344).

Mr. Justice MILLER, in his lectures on the Constitution, 1889–1890 (pp. 240, 241), said:

"The tax must be uniform on the *particular article*, and it is uniform within the meaning of the constitutional requirement if it is made to bear the *same percentage* over all the United States.

"That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the Government, in raising its revenues, should not be allowed to discriminate between the ARTICLES which it should tax."

In discussing generally the requirement of uniformity found in State constitutions, he said:

"The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word 'uniform,' which has been adopted, holding that the uniformity must refer *to articles of the same class—that is, different articles may be taxed at different amounts*, PROVIDED THE RATE IS UNIFORM ON THE SAME CLASS EVERYWHERE, WITH ALL PEOPLE AND AT ALL TIMES.

"Absolute equality and uniformity may not be attainable in practice, but approximation to them is possible, and any plain departure from the rule will defeat the tax. * * * As the foundation of all just and equal taxation is the *assessment* of the property taxed—that is, the ascertainment of its value—in order that the tax may be levied according to some ratio to the value, uniformity of taxation neces-

sarily requires uniformity in the mode of assessment as well as the rate of taxation; or, to quote the language of the supreme court of Ohio in Exchange Bank of Columbus *v.* Hines, 3d Ohio St., 1, uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation."

Mr. Justice Field in the *Railroad tax cases* (13th Fed. Rep., 735).

"Uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of the percentage charged."

County of Santa Clara v. So. Pac. R. R. Co. (18 Fed. Rep., 385). Affirmed by U. S. Sup. Ct., in 118 U. S., 394.

"*The law will look not at the manner in which the tax is imposed, but at the result.* * * * A tax may be said to be uniform if the rate is uniform, yet *uniformity of rate presupposes uniformity of valuation. If, for instance, State bank stocks were apportioned at their par value and national bank stocks at their cash value there would be no real uniformity of rates, though the percentage might be the same in both cases,* since the cash value might be half or double the par value. This principle is recognized in the Railroad tax cases, 92 U. S., 611. * * * The legislature may discriminate between different classes of capital without violating the requirements of uniformity, yet as between individuals of the same class the burden must be equally laid."

City Nat. Bank v. Paducah (1st Thompson's Nat. Bank Cases, 300); 5th Cent. Law Jour., 347 (U. S. C. C.).

In *State Railroad tax cases* (92 U. S., 611), above referred to, the Supreme Court of the United States thus interpreted article 9, section 1, of the constitution of Illinois, which is in part as follows:

"The General Assembly shall have power to tax (certain enumerated classes and persons), in such manner as it shall from time to time direct, by general law, uniform as to the class upon which it operates. The only limitation," said the

Court, "is as to the class upon which the law shall operate—that is, inn-keepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to inn-keepers be uniform as to all inn-keepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies."

From all these cases examined we think that the principles laid down in Cooley on Constitutional Limitations, 6th ed., pages 607 and 608, are the teachings of the law:

"It is of the very essence of taxation that it be levied with equality and uniformity; and to this end there should be some system of apportionment. Where the burden is common, there should be a common contribution to discharge it. Taxation is the equivalent for the protection which the Government affords to the persons and property of its citizens; and, as all are alike protected, so all alike should bear the burden in proportion to the interests secured. * * * When taxes are levied on property there must be an apportionment with reference to a uniform standard or they degenerate into mere arbitrary exactions."

Such seem to be the universal teachings of the law as to the meaning of a constitutional provision requiring uniformity of taxation. Have the courts of Pennsylvania placed an essentially different interpretation upon the provision of the constitution? We do not think that they have.

After the adoption of the constitution of 1874 the courts of Pennsylvania started with the idea that equality of taxation as between members of the same class was embodied in the enactment requiring uniformity taken in connection with the one forbidding exemptions. So we find Pierson, J., in *Londonderry v. Berger* (2 Pierson, 230), making use of the following language:

"Taking sections 1 and 2 of article 9 of the constitution together, it is very clear that the framers of the constitution intended that from its adoption no property of any kind should escape taxation except that enumerated in section 1.

"It might not have imposed on it some particular tax; by classifying, some might be taxed higher than others, but none may be exempt. *All should start fair and equal*, although the legislature might impose afterwards some taxes on one class from which others should be free."

Then comes Fox's appeal, 112 Pa., 352 (1886), in which the Supreme Court used this language in which to declare the doctrine of equality as to members of the same class in no uncertain tones:

"Article 9, section 1, of the Constitution is too important and valuable to be overridden by the legislature or frittered away by judicial construction. It was intended to and does sweep away forever the power of the legislature to impose unequal burden upon the people under the forms of taxation. The evils that led up to its incorporation into the organic law are well known. The burden of maintaining the State has been in repeated instances lifted from the shoulders of favorite classes and thrown upon the remainder of the community. This was done by means of favoritism and class legislation. Article 9 of the Constitution was intended to cut up this system by the roots, and we shall have no more of it if the legislative and judicial departments of the Government perform their full duty in giving effect to the instrument."

Paxson, C. J., in *Fox's appeal*, 112 Pa. St., 352.

Next came *Commonwealth v. Delaware Division Canal Company* (123 Pa., 594).

Under the facts in that case it became apparent that absolute uniformity of procedure would not always produce equality as between members of the same class. Equality was a desideratum, but the Constitution had not enjoined equality, neither had the Constitution enjoined the true value as the proper standard of valuation. Therefore it was announced that the legislature might adopt any method of valuation it chose, no matter how unnatural or arbitrary it might be, so long as it was a uniform method and applied

to every member of a given class. The judiciary could not control the legislature in that respect.

The contention of the defendant in that case was that section 4 of the act of June 30, 1885, P. L., 193, requiring the treasurers of corporations to assess a 3-mill tax upon the *nominal* value of corporation loans, to deduct the same from the interest paid thereon, and to return it into the State treasury, violates article IX, section 1, of the Constitution, because the nominal value of corporate loans is no proper criterion of the actual value, and therefore a uniform tax of 3 mills upon the *nominal* value resulted in a great diversity of rates upon the actual value, and the appellant's contention was that lack of uniformity *in result* was the non-uniformity aimed at by the Constitution, and that the distinction in the taxing act between mortgages and loans by individuals and mortgages and loans by corporations was not warranted by the Constitution, nor was there any proper basis of classification in the distinction between mortgages and loans by domestic corporations and those by foreign corporations.

The contention of the Commonwealth is thus stated:

"If there is substantial uniformity, whether in *results* or in *methods*, however different the procedure, there is a compliance with the constitutional provisions."

The Supreme Court in effect adopted this language and said on page 620:

"Absolute equality is, of course, unattainable; *a mere approximate equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provisions* (*Fox's appeal*, 112 Pa., 353). Even where there may be some disparity of results, if uniformity is the purpose of the legislature, there is substantial compliance."

In other words, *uniformity* must appear in one or other of two ways:

1. *In the method of assessment and collection*, whatever the results, or

2. *In the results*, "approximate equality," despite diversity in methods of assessment and collection.

That case was said to conform to the first standard of uniformity, to wit, uniformity in the method of assessment and collection.

The difference between our case and *Com. v. Del. Div. Canal Co.* is this: That in the latter case there was "*an actual uniformity in the method of assessment and collection*," the tax being a specific tax and therefore uniform.

The Court held that, such being the fact, they could not interfere, simply because there was a diversity of result measured by actual value of the property taxed.

If there is any uniformity as to rate or valuation in sections 6 and 7 of this act of 1891, in the taxation of shares of different national banks or in the method of assessment and collection, it has escaped our observation.

As to the further contention in Com. *v.* Del. Div. Canal Co. relative to classification—

Corporation bonds and mortgages were recognized as a class distinct from individual bonds and mortgages, and bonds and mortgages of foreign corporations as a class distinct from bonds and mortgages of domestic corporations. Nor can it be said that there was any hyper-classification about this distinction.

But if it is contended that this system is uniform in that every bank has the right of election, that does not make the "taxes" uniform. At best it is a choice between two separate and distinct systems of taxation—two methods of valuation and two rates—that are not uniform, and the Constitu-

tion requires the "taxes" to be uniform in some sense of the word upon the class of subjects.

Entirely pertinent at this point is the reasoning of the learned president judge of the court below, used in *Commonwealth v. Edgerton Coal Co.* (164 Pa., 293), affirmed by the Supreme Court since the case at bar was argued. He says:

"How can *uniform* taxes be assessed when one or the other of two different measures of value may be adopted? As well might the legislators prescribe, as the rule to be adopted by local assessors in appraising real estate, that they must assess it at the price at which it would sell for cash *or else on some other basis*, for example, at the amount for which it would be accepted as security by a careful money-lender—which would be much less than it would sell for—and leave it to the caprice of the assessor to adopt whichever test he might choose in each particular case."

And along this line of reasoning we ask, How is the self-interest of the tax-paying corporation in the choice of alternative tests of value and rates of taxation any better aid or guide to uniformity than the "caprice of the assessor"?

If uniformity be violated when the assessor is free to choose one of two alternative methods of valuation, how can it be urged that uniformity is not violated when the taxpayer makes the choice, especially as, in addition, the taxpayer has also the choice of two different and distinct rates at which to pay?

It seems to us to be the rankest and grossest form of discrimination to give to the various members of a class an alternative system of taxation which some of the members may adopt with immense advantage and others can adopt only at an equally pronounced loss.

The next leading case on this subject of uniformity seems to be the case of *Com. v. Brush Elec. Light Co.* (145 Pa., 147), 28 W. N. C., 527 (1891).

In that case section 4 of the act of June 7, 1879, P. L., 112,

was under examination. This section imposed a State tax on the *capital stock* of corporations, both domestic and foreign, in Pennsylvania. The method of appraising the value of the capital stock was by reference to dividends "made or declared" during the previous year.

It provided that corporations which have "made or declared" during any year dividends amounting to 6 per cent. or more upon the par value of their capital stock shall be taxed at the rate of one-half mill upon each 1 per cent. of dividend; otherwise at the rate of 3 mills for each dollar of the *actual value.*

The result was that the law practically assumed that the stock of a corporation that paid a 6 per cent. dividend was actually worth par; that if it paid a 12 per cent. dividend it was actually worth twice its par value, or, what amounts to the same thing, should bear double the rate on a valuation at par. If it paid no dividend at all for any reason, then the standard of appraisement by reference to dividends failed and an actual appraisement of the market value of the stock was made, on which valuation a uniform tax of 3 mills was imposed on each dollar of the actual value.

A dividend might be earned though not declared, in which event the actual value of the stock would be increased, and the system was designed to reach that increased valuation.

If no dividend was either earned or declared, the value of the stock would naturally diminish, and the system was designed to make allowance for that actual diminished value.

On the other hand, the system was designed to punish inflated or artificial values by imposing a heavier tax where they occurred and no dividend was declared or earned.

Unquestionably in this system *uniformity* was the *purpose of the legislature,* whatever the results might be.

The learned judge of the court below found as a fact that "owing to the varying conditions of corporate affairs, prop-

erty, and business the rate of dividends is not a certain measure of the *actual value* of corporate stocks." It was never claimed, as in our case, that in a large number of instances in the class of property selected there was no effort in the act to get at an actual valuation.

As shown by the table submitted with that case, the actual result of the system was that corporations paid under it taxes at varying rates on the market value of their shares; but here again no constitutional enactment required the legislature to take the actual or market value as the standard of valuation, and hence it follows that when any other standard was taken inequalities in the results by reference to the market value followed, notwithstanding the fact that the standard of valuation selected was perfectly uniform as to all property of the same class.

In discussing this case the Supreme Court, page 154, laid down the very principle we are contending for:

"Taxes must be levied under general laws; and *when the measure of value and the rate are uniform and applicable to all the members of the given class* the incidental hardships and inequalities must be borne."

Continuing, the Court say:

"The act of 1879 taxes the capital stock; but some stocks are of much and some of little value. How are these to be distinguished? The act looks properly at the earning capacity of the stock or the business it represents as affording the best measure of its value. It takes the earnings that are divided and adds those that are carried to the sinking fund, and the total thus made is used as the standard of valuation. If these amount to 6 per cent. or upward, the stock is worth its face value or more, and for purposes of taxation it is valued at par.

"The rate of taxation (upon the par value) slides upward with the amounts carried to dividend account and to sinking fund. If this amount is just 6 per cent. on the capital, the rate is three mills on the dollar of the par value. If it is seven per cent., the rate is 3½ mills on the dollar, and

so on at the rate of a half mill on the dollar for every one per cent. of advance in the earnings, as shown by combining the items selected for this purpose.

"But if this total is below six per cent. it is assumed that the stock is worth less than par, and provision is made for an appraisement of its value.

"When this is made the rate of three mills is applied to the appraised value in order to ascertain the amount of the tax.

"Why the net earnings were not adopted as the proper measure of value, instead of so much of them as may be divided or carried to the sinking fund, it is not material to inquire.

"The standard adopted is applied impartially."

A careful examination of this act of 1879 shows two things:

(1.) That it contemplates an honest effort in every instance to get at the actual value, and

(2.) A practically uniform rate of 3 mills upon that actual value.

It may be as the learned court below said: "The rate of dividend is not a certain measure of the actual value of corporate stocks." It is, however, one means of getting at the *actual value* where dividends of 6 per cent. or more were declared, and where not declared the *actual* value was ascertained in another way, and always and in every case upon the *actual value* obtained in the one way or the other a uniform rate of practically 3 mills on the dollar was assessed.

This case simply goes a step beyond *Commonwealth v. Del. Div. Canal Co.*, and holds that a diversity of methods of obtaining the actual value is not forbidden by the Constitution, if when the actual value is obtained the rate is uniform, even though the results lack uniformity.

How different is our case from this.

In our case no effort whatever is made in the case of every bank to obtain the actual value of the shares taxed by methods diverse or otherwise, and when a valuation is finally obtained no uniform rate of taxation is enjoined, while in the case of some banks only the shares issued are taxed, and in the case of other banks both shares subscribed and those issued are taxed.

But, as though realizing the peril of the doctrine that diverse methods of ascertaining the actual valuation of different property of the same class may be followed, we think that the Supreme Court has been quick to qualify or amend this doctrine in their latest utterance on this subject, found in the case of *Commonwealth v. Sharon Coal Co.* (164 Pa., at p. 305), where the Court once more announce the doctrine that the purpose of article IX, section 1, of the Constitution is to secure equality of burden as between members of the same class.

The following is the language of the Court:

"All properties in the same class must be taxed without discrimination in the rate of tax imposed, *and the rule for ascertaining the value of the property must be the same.* The actual cash value of one capital stock in the same class cannot be ascertained from net earnings, another from profit, another from surplus, and another from dividends, for each method will produce a different valuation and *result in inequality*, but each may be taxed on the actual cash valuation from any relative evidence tending to establish the fact."

We cannot see how better could be expressed the principle of law which we apprehend governs our case.

The learned president judge of the court below seems to us to have declined to discuss the principle involved in this phase of the case. His position seems to be, if we understand it, that the inequalities of taxation of property for the same class revealed in this case are no worse than those made evident in *Commonwealth v. Delaware Division Canal Co.* and in *Commonwealth v. Brush Electric Light Co.;* that

the taxing acts were constitutional in those cases, and that therefore an entirely different and distinct taxing act under consideration here, producing inequalities, is also constitutional.

But it seems to us that the inequalities produced by the act are only half the offending; that along with the inequalities resulting goes a diversity in the method of valuation, in the rate of tax, and in the property taxed, absolutely fatal to the act when the resulting inequalities follow and are made to appear.

The methods of assessment and collection on their face lack uniformity, but that is not sufficient to vitiate the act if the results are uniform. The results were procured and made evident, and it does seem to us that if absolute lack of uniformity was ever demonstrated it has been in this case.

If from any point of view this act can be properly labeled "uniform," we have not been able to find it.

If we may be allowed to sum up our views as to the meaning and purpose of article IX, section 1, of the Constitution, as interpreted by the supreme court of Pennsylvania, we would say that it contemplates three things:

1. That all taxation shall be by general laws.

This law is a general law.

2. That subjects for taxation shall be classified.

Shares of stock in national banks properly constitute a class.

3. That taxation shall be uniform upon all the members of a class.

This requirement is fulfilled.

1. Where a uniform valuation is reached by a *uniform* method and the rate is uniform, as in *Com. v. Delaware Division Canal Co.*

2. Where a uniform valuation is reached by *diverse* methods and the rate is uniform, as in *Com. v. Brush Electric Light Co.*

3. Where the results are uniform, so that the law is not concerned with the method of valuation or rate.

We cannot see how sections 6 and 7 of the act of June 8, 1891, conform in the remotest degree to any one of these standards laid down by this Court.

II.

THE TAXATION HEREIN VIOLATES THE ACTS OF CONGRESS OF 1864 AND 1868, REGULATING THE TAXATION OF SHARES OF STOCK OF NATIONAL BANKS, IN THIS, TO WIT:

(*a.*) It levies upon the plaintiff in error a tax at a greater rate than is levied upon other moneyed capital in the hands of individual citizens of the State of Pennsylvania, said moneyed capital being invested in the shares of stock of other national and State banks in competition with plaintiff in error.

(*b.*) Because the system embodied in sections 6 and 7 of the act of 1891 requires the auditor general to look to the shareholder for the tax in the case of State banks, while in the case of every national bank the auditor general is required to look to the bank itself, except in cases where the bank purchases exemption from *local* taxation by paying 8 mills on the par value of the shares, in which case no State tax, as such, is paid by the State bank or its shareholders, and the act in no case provides any means of

collecting any tax whatever from the non-resident shareholders of State banks, but requires a national bank to pay the tax of a non-resident shareholder.

(c.) Because the present tax is in reality a tax upon the capital stock of the bank and not a tax upon the shares as "the personal property of the owner or holder of such shares."

Taking up these propositions in their order—

(a.) *It levies upon plaintiff in error a tax at a greater rate than is levied upon the moneyed capital in the hands of individual citizens of the State of Pennsylvania, said moneyed capital being invested in the shares of stock of other national and State banks in competition with plaintiff in error.*

State taxation of shares of stock of national banks must be in accordance with the act of Congress of June 3, 1864, c. 106, s. 41, v. 13, p. 112, of United States Statutes at Large, which statutes, in their present application and form, are found as section 5219 of the Revised Statutes of the United States, which section, *inter alia*, provides:

"That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value as other real estate is taxed."

This Federal statute has been discussed, and its purpose and meaning have been, in a number of cases, declared by the Supreme Court of the United States.

The case of *Boyer v. Boyer* (113 U. S., 691), decided in 1885, gives a brief history of this legislation:

"State taxation of national bank shares was permitted by the act of Congress of June 3, 1864, 13 Stat., 111, ch. 106, section 41, subject to the restriction that it should not be at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of the same State. But that section contained a proviso to the effect 'that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located.' The case of *Lionberger v. Rouse* (9 Wall., 468) arose under that act. * * * The question there was whether shares of a national bank were exempt from State taxation merely because *two* State banks of issue, organized before the national banking act was passed, and which held a very *inconsiderable portion of the banking capital of the State*, had by their charter the right to pay a certain per cent. on the amount of their capital stock in full of all State bonus and taxes—an amount less than that imposed upon national bank shares. The shares of other associations in the State having the privileges of banking except the power to remit bills were taxed like the shares in national banks. It was held that Congress meant, by reference in the act of 1864 to taxation of State bank shares, to require as a condition to taxation by the State of the shares in national banks that she should, unless restrained by valid contract, tax in like manner the shares of banks of issue of her own creation. There was no question in that case of discrimination against capital invested in national bank shares in favor of moneyed capital which was invested otherwise than in bank stock.

"But the act of 1864 was so far modified by that of February 10, 1868, 15 Stat., 34, ch. 7, that the validity of such State taxation was thereafter to be determined by the inquiry whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rates imposed upon shares in State banks. The effect, if not the object, of the latter act was to preclude the possibility of any such interpretation of the act of

Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in State banks, *from discriminating against national bank shares in favor of moneyed capital not invested in State bank stock.* At any rate, the acts of Congress do not permit any such discrimination now."

The purpose of this legislation by Congress was more accurately defined, and its application more closely limited, in the case of *Mercantile Bank v. New York* (121 U. S., 138) in 1886, where, on page 155, the Court say:

"The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks was to render it impossible for the State, in levying such a tax, *to create and foster an unequal and unfriendly competition* by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy.

"Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. *Of course it includes shares in national banks; the use of the word 'other' requires that.* If bank shares were not moneyed capital the use of the word 'other' in this connection would be without significance."

At this point, and in contemplation of this practically latest utterance of the Supreme Court of the United States, it might be well to pause to consider the effect of this language of the Supreme Court of the United States. The author of the syllabus of the case, as reported in 121 U. S., 138, thus expresses his understanding of it:

"The term 'moneyed capital,' as used in Revised Statutes, section 5219, respecting State taxation of shares in national banks, embraces capital employed in *national banks and capital employed by individuals,* when the object of this business is the making of profit by the use of their moneyed capital as money—as in *banking,* as that business is defined in the opinion of the Court."

This decision *excluded* from the terms "other moneyed capital"—as employed in the act:

(1.) "Moneyed capital in the hands of a *corporation*, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in securities payable in money."

(2.) Stock of trust companies.

(3.) Stock in savings banks.

(4.) Deposits in savings banks.

(5.) Bonds of municipal corporations.

(6.) Stock of insurance companies.

(7.) "All other business, trading, manufacturing and miscellaneous corporations whose business and operations are unlike those of banking institutions."

It *included* in the terms "*other moneyed capital*" "institutions or individuals carrying on a *similar* business and operations and investments of a like character."

It would seem to *exclude* from the term "other moneyed capital," as used in the act, mortgages that were included by the decision in *Boyer v. Boyer* (113 U. S., 691), because moneyed capital invested in mortgages is not in competition in any way with moneyed capital invested in national bank shares—and it would seem to *include* only "moneyed capital of institutions or individuals carrying on a *similar* business and operations and investments of a like character."

It would seem to include, therefore, substantially only moneyed capital invested in "similar business," and we do not know of any "institution carrying on a business" more "similar" to a national bank than a national bank.

"Other moneyed capital" in the act of Congress means, under the decision in *Mercantile Bank v. New York*, we

think, other moneyed capital invested in the banking business.

In Pennsylvania by far the greater portion of all moneyed capital invested in the banking business is invested in the shares of national and State banks.

The actual value of the shares of stock of national banks in the State in 1893 was about 128 millions of dollars, and the actual value of the shares of stock of all the State banks was about sixteen millions of dollars.

If now, in discriminating against any national bank or class of national banks, it is not the moneyed capital invested in the shares of stock of these banks that the act of Congress forbids the Commonwealth to favor in its taxing system, there is practically no other moneyed capital in the State with which to compare and contrast the taxation effected by the State legislation on the shares of stock of any national bank, under the doctrine of *Mercantile Bank v. New York.*

The language of Mr. Justice Matthews, on page 155, is this:

"Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital.' Of course *it* includes shares in national banks. The use of the word '*other*' requires that," etc.

The Court does not say that the words "moneyed capital" includes shares in national banks, but that the expression "other moneyed capital" includes the shares of national banks.

The contrast is between "all the shares in *any* association" and "other moneyed capital," meaning especially other moneyed capital invested in the shares of institutions similar to "any" national banking "association."

The terms of the section enjoin uniformity in the taxation of the shares of moneyed capital invested in the shares of national banks.

The section twice makes use of the expression "*all* the shares," showing that, if taxed at all, they were to be *all* taxed.

The section once makes use of the expression "all the shares in *any* association," showing that the individual association was a subject of consideration. The use of the word "any" shows that.

If the position of the learned Court is correct, that section 5219 of the Revised Statutes contemplates with indifference the taxing by the State of the shares in some national banks at a higher rate than the stock in other national banks, then the States at the beginning of the system might easily have passed laws taxing the shares of stock of *national* banks that had formerly been *State* banks at a less rate than they taxed the newly organized national banks, and thus have discriminated against the new corporations and in favor of the old ones—the very thing that the act was aimed to defeat, and capital would thus have been prevented from going into the new national banks or they might now tax the shares of newly organized national banks at a greater rate than the shares of the older ones, and this Pennsylvania system practically operates to do that very thing.

It being admitted, then, that the State cannot levy a tax under the Federal statute on bank shares at a greater rate than upon "other moneyed capital," and that "other moneyed capital" includes the shares of stock of other national and State banks, it follows as a necessary consequence that if the State allows many other national and State banks in competition with appellant to pay less than 4 mills upon the actual value of their shares of stock, it cannot, we think, compel the appellant to pay 4 mills upon the actual value of its shares of stock.

In *People v. Weaver* (100 U. S., 546) it was said:

"In the best use of the language employed by Congress we are justified in looking at the rule of valuation adopted

by the State in assessing taxes on these shares as well as to the uniformity of percentage to ascertain whether the congressional restriction has been violated."

This case decides that section 5219, Revised Statutes of the United States, "has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon." It construes the act of Congress so as to forbid a discrimination in any such indirect or roundabout way as the discrimination is effected in our case.

In *Stanley v. Supervisors of Albany* (121 U. S., 542) the Supreme Court of the United States quote the language of *People v. Weaver* above, and add:

"If this were not so, a rule of appraisement applied to shares of national banks different from one applied to other moneyed capital might lead to such various valuations as to materially affect the amount of tax levied, although the same percentage should be charged on valuations. *There must be a uniform rule of appraisement of value and the same percentage charged on the values determined to meet the requirements of the statute.*"

Again, in *Pelton v. National Bank* (101 U. S., 146) Mr. Justice Miller said:

"Any system of assessment of taxes which exacts from the owner of the shares of *a national bank* a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner does tax them at a greater rate within the meaning of the act of Congress."

Lionberger v. Rouse (9 Wall., 468) is an instructive case in connection with this branch of the discussion.

In that case it appears that the State of Missouri had two banks of issue and circulation which it had by contract disabled itself from taxing beyond a certain amount. In behalf of Lionberger, a shareholder in one of the national

banks, it was contended that the State could not tax the shares of national banks at a greater rate than that levied upon these two banks of circulation and issue, because section 41 of the national banking act at that time forbade the taxation of the shares of national banks at a greater rate than that imposed upon the shares "in any of the banks organized under the authority of the State where such association is located." To this the Supreme Court of the United States said: "Congress meant no more than to require each State as a condition to the exercise of the power to tax the shares in national banks that it should, so far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

The standard of comparison, as was said in Boyer *v.* Boyer, *supra*, is now not the rate at which the shares of State banks are taxed, but the rate at which "other moneyed capital in the hands of individual citizens of the State" is taxed, which the Supreme Court has said, in *Mercantile Bank v. New York*, *supra*, means moneyed capital invested in the same kind of business.

Supposing that, instead of two banks in the case cited, it had appeared that more than seventy State and national banks in Missouri were partially exempted from taxation, not by a perpetual contract which the State could not annul, but by a law of only seven years' standing and of questionable constitutionality; supposing that the State of Missouri had had standing open for acceptance on its statute books a contract which a certain class of State banks could accept with great benefit and the national banks could not; supposing that it appeared in this way that many millions of dollars in State bank shares paid a much less rate of taxation than the shares of national banks; that in the town where the contest arose one-third the State banks paid a less rate on the actual value of their shares than was assessed on the appellant; that a decision in favor of the appellant would bring about a change in the system of tax-

ation that would yield many thousands of additional revenue to the State, and produce a uniform and equitable result in the proportion of taxes paid, is there any doubt but that the Supreme Court of the United States must have decided in favor of the appellant?

The circuit court of the United States, in 1877, in the case of *City National Bank v. Paducah* (1 Thompson's National Bank Cases, 300); 5 Cent. Law Journal, 347, discussed the bearing of the Federal statute after this manner (page 309 *et seq.*):

"The law will look not at the manner in which the tax is imposed, but at the result. * * *

"It is true exact uniformity can never be attained, but the law requires at least an approximation to it, *else the proviso in the Revised Statutes is useless.*

"While the tax is legal if laid at the same 'rate' as other moneyed capital is taxed, and it may be said to be uniform if the rate is uniform, *yet uniformity of rate presupposes uniformity of valuation.* If, for instance, State bank stocks were appraised at their par value and national bank stocks at their cash value there would be no real uniformity of rates, though the percentage might be the same in both cases, since the cash value might be half or double the par value. This principle is recognized in the *Railroad tax cases* (2 Otto, 611.) * * *

"The legislature may discriminate between different classes of capital without violating the requirements of uniformity, yet as between individuals of the same class the burden must be equally laid."

This case, among other things, held that where in the city of Paducah there were four national banks and one State bank, and the State bank, by reason of a contract, could not be taxed at more than 50 cents per share, a law imposing a tax at $1.05 per share upon the shares of the national banks was invalid because in conflict with the Federal statute, section 5219.

We think that from the foregoing, with reference to sec-

tion 5219 of the Revised Statutes of the United States, the following conclusions are to be derived:

1. That "other moneyed capital" means particularly "other moneyed capital" invested in business similar to the banking business, where a competition may arise—that is, in the shares of stock in banks or institutions of a similar character, and that the contrast is between "all the shares in any association" and "other moneyed capital."

2. That the shares of stock in some national banks of the State cannot, without a violation of the Federal statute, be taxed at a higher rate than the shares of stock in many other national and State banks where the two classes come into competition.

3. That the higher "rate" of taxation of bank shares forbidden by the statute has reference to unfavorable *results*, forbidding those reached otherwise than by a uniform rule of appraisement, and by a uniform percentage charged on valuations made by a uniform system of valuation.

But supposing that the learned court is entirely correct, and the contrast was only between shares of stock in national banks and other moneyed capital not so invested, what shall be said of the fact established in this case that this law does actually tax the shares of banks like the defendant at a greater rate (under the rule in *People v. Weaver*, 100 U. S., 546) than it taxes the shares of stock of a considerable proportion of State banks.

The whole number of State banks is comparatively small, the amount of moneyed capital invested in their shares in Pennsylvania is not great, but a large number of these shares are favored by this system, to the disadvantage of many national banks coming in competition with them.

There are many towns in Pennsylvania where a State bank is by this system taxed at a very much less rate than

a national bank in competition with it. Several such instances of discrimination exist in Pittsburgh.

In Williamsport one State bank pays a tax of only eight-tenths of 1 mill on the value of its shares, while a national bank near by pays 4 mills. As to that town this system must violate section 5219 of the Revised Statutes. The full extent of this discrimination in favor of State banks it is impossible to show, because the returns from the State banks to the banking department of the State are as yet so imperfect; but many State banks are manifestly favored.

If section 5219 was framed to prevent an unfriendly competition from similar institutions, and under this system 12 per cent. of the shares of all State banks and 27⅞ per cent. of the shares of all national banks in the State, and 40 per cent. of the shares of all national banks in Pittsburgh are taxed at a less rate than the defendant, how can it be said that an "unfriendly competition of similar institutions" is prevented in the defendant's case?

If the State can favor 55 or 60 national banks and a large number of State banks, the richest and oldest of them, to the disadvantage of the others, it can favor one national or one State bank to the disadvantage of all the rest or it can favor all national banks but one.

It is hard to believe that the act of Congress contemplated that, and the act of Congress, section 5219 of the Revised Statutes, ought to be, in all fairness, construed so as to prevent this if possible.

(*b.*) The act violates section 5219 of the Revised Statutes of the United States for the further reason that it requires the auditor general to look to the shareholder for the tax in the case of State banks, while in the case of each national bank he must look to the bank only, except in cases where the banks purchase exemption from the local taxation by paying 8 mills on the par value of the shares, and in such cases no State tax as such is paid at all by the State banks or their shareholders, and the act in no case provides

any means of collecting any tax whatever from the non-resident shareholders of State banks, but requires a national bank to pay the tax of a non-resident shareholder.

A State bank may elect to purchase exemption from *local* taxation of its shares and of so much of the capital and profits of the bank as shall not be invested in real estate by paying a tax into the State treasury of 8 mills on the par value of all its shares.

By "local taxation" the Supreme Court has said:

"Taxation for local purposes or by local authorities was intended and not taxes levied under the State as distinguished from Federal laws."

Bank *v.* Wilkesbarre, 148 Pa., 604.

There is, in fact, now no local taxation of bank shares and could not be in the case of a national bank.

Bowlby *v.* Griggsby, 8 Pa. Co. Ct. Rep.

"All exemptions are to be strictly construed; they embrace only what is within their terms."

Cooley on Taxation (ed. 1879), p. 146.

The surrender of the power to tax before the constitution of 1874, article IX, section 3, was passed could not be extended by implication, and if one tax is expressed it cannot be presumed to extend to others.

No power to tax need be reserved; it exists and remains unless expressly yielded.

Jones & Nimick Mfg. Co. *v.* Commonwealth, 69 Pa., 138.

Eastern Bank *v.* Commonwealth, 10 Pa., 442.

Erie R. R. Co. *v.* Commonwealth, 66 Pa., 84.

Academy of Fine Arts *v.* Philadelphia, 22 Pa., 496.

Miller *v.* Kirkpatrick, 29 Pa., 226.

"Exemptions, no matter how meritorious, are of grace, and must be strictly construed."

Crawford *v.* Burrell, 53 Pa., 219.
Platt *v.* Rice, 10 Watts, 352.
Delaware R. R. Tax, 18 Wall., 206.
Frask *v.* McGuire, 18 Wall., 391.
Note to Pa. R. R. Co. *v.* Mayor, 18 Am. and Eng. Corp. Cases, 183.

It follows that State banks, by paying 8 mills on the par value of their shares in order to purchase exemption from *local* taxation, do not thereby purchase any exemption from State taxation.

The law, however, fails to provide any means of assessing a State tax as such against State banks at all and collects no State tax as such from them.

The history of the act of 1891 shows that the right to impose a State tax as such on the banks electing to pay the 8-mills tax on the par value of the shares was reserved.

The act of 1891 is an amendment of the act of 1889, which in turn was a supplement to and amendment of the act of 1885, section 3, P. L., 194.

Which provided:

"In case any bank * * * shall elect to collect annually from the stockholders thereof a tax of $\frac{8}{10}$ of one per cent. upon the par value of all the shares of said bank, * * * and pay the same into the State treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be *exempt from all other taxation* under the laws of this Commonwealth."

The acts of 1889 and of 1891 amended the last clause so as to read "shall be exempt from *local* taxation under the laws of this Commonwealth."

"The substitution in the act of 1889 of the phrase '*local* taxation under the laws of this Commonwealth' shows an

unmistakable intention to confine the exemption to taxation for *local* purposes or by *local* authorities."

Rice, J., in Wilkesbarre Bank *v.* Wilkesbarre, 148 Pa., 604.

Nor does the system under the act collect any State tax from those State banks that neglect to purchase exemption from local taxation, by paying into the State treasury 8 mills on the par value of their shares. As to such State banks the system looks to the shareholders, and the auditor general collects a tax of 4 mills on the market value of the shares from the shareholder if he can. *If the shareholder of the State bank is out of the State there is no method of reaching him.*

Thus, in the case of a State bank, the bank may, if it chooses, purchase an exemption from local taxation for its shareholders, or, if it doesn't choose, the shareholder may himself pay an *ad valorem* State tax on his shares. In either case the State bank is liable for no State tax whatever, while in the case of a national bank the bank itself is absolutely liable in every instance.

The 8 mills on the par value of the shares paid to purchase exemption from *local* taxation, properly speaking, is no State tax at all, but the law neglects to provide any means of collecting a State tax, as such, from those purchasing an exemption from local taxation. Thus the law makes no State bank liable for any tax on its shares, provides no machinery for the collection of such a tax from any non-resident shareholder, but in the case of every national bank makes the bank absolutely liable for the tax of the non-resident and resident shareholder alike.

(*c.*) The present tax is in violation of section 5219 of the Revised Statutes of the United States, for the further reason that it is in reality a tax upon the capital stock of the bank, and not a tax upon the shares as "the personal property of the owner or holder of such shares."

The provisions of the Federal statute were necessary in order to impose any tax whatever on these bank shares.

People *v.* Weaver, 100 U. S., 543.

A State tax on the *capital stock* of the bank is illegal and void.

Collins *v.* Chicago, 4 Bissell, 472.
Bank of Omaha *v.* Douglas Co., 3 Dillon, 298 (1873).
Salt Lake Bank *v.* Golding, 2 Utah, 1 (1876).
Macon *v.* First National Bank, 59 Ga., 648.

It does not follow, however, that a tax on the shares cannot, if properly assessed, be collected from the bank.

The Supreme Court of the United States, in National Bank *v.* Commonwealth (9 Wallace, 353; 1869), decided otherwise, viz., that the tax, if "rightfully laid" on the shares of stock, is valid, and can be collected from the bank.

The question is, when is a tax to be collected from the bank "rightfully laid" against the shares of stock as the personal property of the shareholder?

In the above case the tax was a *specific* tax of "50 cents per share on each share equal to 100 dollars of stock therein."

The amount of tax was unvarying, and the statute itself gave to the owner notice of the amount. It was not an *ad valorem* tax, as in the present case, where the stock is subject to a valuation by an assessing officer.

This Court said in that case (p. 360):

"It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may in the market be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but *the tax is the same in each case. This shows that it is the share which is intended to be taxed, and not the cash or other actual capital of the bank.*"

That criterion will not make the present tax a tax on the shares of stock, but a tax on the capital stock, because the Pennsylvania tax is an *ad valorem* one, increasing or diminishing with the valuation, which ought to be a judicial act, in which the shareholder is personally interested, as in the case of his other personal property.

Again, in the case of Miller *v.* National Bank (46 Ohio State, 430; 3 Brown's National Bank Cases, 711; 1889) the same question arose—as to whether the assessment under the Ohio statute was one on the capital stock of the bank or on the shares of stock as the property of the shareholders.

In that case the Ohio supreme court said:

"If any doubt remains that the tax was intended to be assessed on the shares, it is certainly removed by the provision that the tax remains a lien on the shares."

By the same reasoning, if any doubt remains that this tax imposed by the Pennsylvania act of 1889 and its supplement, the act of 1891, is a tax on the capital stock, the doubt is removed by the provision of section 31 of the act of June 1, 1889, P. L., 437; which provision is still in force:

"That all taxes *imposed by this act* shall be a lien upon the *franchises and property, both real and personal,* of corporations, &c., from the time said taxes are due and payable."

Thus the tax is made a lien on the franchises and property of the bank.

The auditor general, we think, treats it as a tax on the capital stock, and sends out his blanks accordingly. (See R., p. 7.)

Again the same question arose in New Orleans *v.* Houston, 119 U. S., 265 (1886), as to the following statute of the State of Louisiana:

"No assessment shall hereafter be made under that name, as heretofore, of the capital stock of *any national bank* * * * of any corporation * * * whose capital stock is represented by shares, *but the actual shares shall be assessed*

to the shareholders who appear as such upon the books, * * * and it shall be the duty of the president or other proper officer to furnish to the tax-collector a complete list of those who are borne upon the book as shareholders, and *all the taxes so assessed shall be paid by the bank* * * * *or corporation, which shall be entitled to collect the amounts from the shareholders or their transferees.*"

In that case this Court said:

"Although the assessment is not to be made upon its capital stock, but upon the shares of shareholders appearing upon its books, nevertheless the tax so assessed is to be paid by the company, although it is entitled to collect the amount so paid from the shareholders on whose account it is payable; but this payment by the company is to be made irrespective of any dividends or profits payable to the shareholders out of which it might be repaid. * * * Indeed it is quite apparent from the language of the whole section that while nominally the taxes authorized are not to be assessed upon the capital stock of the corporation in the aggregate as its property, yet in substance that is its effect.

"The taxes are assessed upon the actual shares as registered in the names of the individual shareholders, but are to be paid by the corporation, so that while the form and mode of taxation is changed, its substance remains as though assessed against the corporations by name."

A later case in the circuit court of the United States, Citizens' Bank of Louisiana *v.* Board of Assessors, 54 Fed. Rep., 73 (1893), on the authority of New Orleans *v.* Houston, held that "the imposition of a tax upon the shares of the bank according to the Louisiana statute, which requires the bank to pay the tax and then look to the dividends upon the shares and to the stockholders for reimbursement, is a tax upon the bank itself."

From these three cases three criteria seem to have arisen, whereby it may be ascertained whether or not such a tax as the present is a tax upon the shares of stock or upon the capital stock:

1. Is it a fixed and unvarying tax—that is, a *specific* tax of a certain amount on each share, as in Nat'l Bank *v.* Commonwealth, 9 Wallace, 353?

2. Is the tax made a lien on the share of the shareholder, as in Miller *v.* First National Bank (46 Ohio St., 430), or a lien upon the franchises and property of the corporation?

3. Is the tax to be paid by the corporation irrespective of whether or not there are any dividends or profits payable to the shareholder out of which it might be repaid, as in New Orleans *v.* Houston, 119 U. S., 278?

These criteria, if applied to the present case, make the present tax one upon the capital stock as the property of the bank.

1st. Because the tax is an *ad valorem* one, in theory, laid upon personal property according to its value, of which valuation the owners of the shares ought to have notice, as we shall hereafter show, and not a specific tax on the shares of which the statute affords notice.

2d. Because the act makes the tax a lien on the property and franchises of the bank, and not on the shares.

3d. Because it is payable in thirty days by the bank, irrespective of whether it can collect the tax from the shareholders or not, and irrespective of whether there are in its hands any dividends or profits belonging to the shareholders out of which it may be reimbursed.

4th. Because, being an *ad valorem* tax, it is assessed *in solido* against the bank upon the capital stock, surplus, and undivided profits (see auditor general's settlement, R., p. 7), conforming to the state of facts in Bank tax case, 2 Wallace, 200 (1864).

5th. Because the bank is given no remedy whatever against the shareholders or means whereby it may collect the tax from them—no lien on their dividends or shares or other property.

6th. Because the penalty of 50 per cent. is imposed, not for failure to collect the said tax from the shareholders, but for failure to pay the said tax at the end of thirty days.

Several recent cases recognize these positions:

"Under Revised Statutes, section 5219, which declares that nothing in the national banking act shall prevent all the shares of stock of a national bank from being included in the assessment of the personal property of the owners of such shares, an assessment of the entire stock of a national bank *in solido* against the bank itself is invalid."

Nat. Bank of Virginia *v.* City of Richmond, 42 Fed. Rep., 877 (1890).

The same thing was decided by the circuit court of the United States in First National Bank *v.* Richmond, 39 Fed. Rep., 309 (1889).

So the supreme court of Kansas, in First National Bank of Leonti *v.* Fisher, 45 Kansas, 726 (189–), decides:

"The assessment of the entire capital stock of a national bank *in solido* against the bank itself is invalid.

"The bank may pay the tax assessed upon the shares of its different stockholders, and it will have a lien thereon when it pays such a tax until the same is satisfied, but if for any cause the tax levied upon the different stockholders is not paid by the bank the property of the individual stockholders will be liable therefor."

We therefore conclude, from a study of the act itself and from the cases cited, that the present tax is a tax on the capital stock of the bank and not on the shares of stock as required by section 5219 of the Revised Statutes.

III.

If the present settlement is a tax on the share at all, then we contend that it is null and void, because it violates the fourteenth amendment of the Constitution of the United States, section 1, which is in part as follows:

"Nor shall any State deprive any person of property without due process of law, nor deny to any person the equal protection of the laws."

(*a.*) Because it attempts to take the personal property of the shareholders without due process of law in imposing an *ad valorem* tax upon the property of individuals without giving to the shareholders notice or any opportunity to be heard.

The shareholder, whose personal property under section 5219 of the Revised Statutes of the United States is what is being taxed, has, under the act of assembly, absolutely no standing whatever. No tax is settled against *him* by the auditor general, and there is no authority under the act of 1811 for *him* to appeal to the common pleas of Dauphin county or any other court.

The owners of the shares of stock of a national bank are left, under this system, without any means of access to the courts, while the right of access is carefully preserved to the owners of shares of stock in a State bank, against whom as individuals the tax is settled, and from whom in person the auditor general is directed to collect the tax on the shares, and who, therefore, have the right to appeal to the Dauphin county courts or to test the valuation by resisting payment.

We contend that the act of 1891 is void as to shareholders of national bank shares, because it fails to prescribe any means of notice to them in a case where an *ad valorem* tax

on their personal property is laid or to give them an opportunity to be heard on the subject of this valuation.

Let us bear in mind three things:

1st. That the act of Congress, section 5219, authorizes the inclusion of the shares for purposes of taxation "in the valuation of the personal property of the owner or holder."

2d. That the present tax is an *ad valorem* tax.

3d. That the Supreme Court of the United States has said that a tax "rightfully laid" on the shares of stock may be collected from the bank.

Bank *v.* Com., 9 Wallace, 353.

From these three propositions the query arises, What is required that an *ad valorem* tax on the shares of stock, as the personal property of the shareholder, may be rightfully laid, and so collectible from the bank?

The answer to this question will soon appear.

"Taxes are generally classified as:
"(*a.*) Specific taxes.
"(*b.*) *Ad valorem* taxes.
"(*c.*) Taxes apportioned by benefits.
"The last two classes are necessarily based upon an assessment of actual values, whereas in the first class the valuation is either fixed by statute or the tax is intended to subserve some supposed public interest or policy."

Mr. Justice Clark in Commonwealth *v.* Lehigh Valley R. R. Co., 129 Pa., page 455 (1889).
Cooley on Taxation (ed. 1879), page 175.

In Hagar *v.* Reclamation District, 111 U. S., 710, Mr. Justice Field points out clearly the distinction between the cases of tax assessments where notice to the owners is necessary and tax assessments where it is not.

When there is a tax at a fixed rate on dividends or on interest; when there is no inquiry into the weight of evi-

dence nor for anything in the nature of judicial examination before collection (as in National Bank *v.* Com., 9 Wallace, 353; Dollar Savings Bank *v.* United States, 19 Wall., 227; King *v.* United States, 99 U. S., 229; Bell's Gap. R. R. Co. *v.* Pennsylvania, 134 U. S., 232), no notice to the owners is necessary, but when a tax is imposed upon property *according to its value*, to be ascertained by the assessors upon evidence, the officers in estimating the value act judicially, and notice of some kind to the owners is necessary.

The Court adds:

"The law in prescribing the *time* when such complaints will be heard gives all the notice required and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property in due process of law."

The Pennsylvania statute prescribes neither time when nor place where such complaints will be heard. Exactly in line with this is the language of Mr. Justice Bradley in Bell's Gap R. R. Co. *v.* Pennsylvania, 134 Pa., 237:

"As to want of notice to the owners of the bonds on which a *specific* tax had been assessed—

"What notice could they have which the law does not give them? They *know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed*, and that they will only be required to pay this tax when and as they receive the interest. * * * The process of taxation does not require the same kind of notice as is required in a suit at law or even in proceedings for taking private property under the law of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages or in subordination to the principles that underlie them.

"We see nothing in the process of taxation complained of that is obnoxious on this score. *Stockholders in the national banks are taxed in this way*, and the method has been sustained by the express decision of this court in National Bank *v.* Com., in 9 Wallace, 353."

With the distinction held in mind between taxes specific and taxes *ad valorem*, the various cases on the subject of notice are seen to harmonize.

Where the tax is specific, as, for example, a tax of so much per share or a tax on a fixed valuation, no notice to the property-owner is required; but where the tax is *ad valorem*, on property according to its value, the owner is vitally interested, and notice is required or the means of notice to the owner of the valuation by "due process of law."

In the words of the Supreme Court of the United States in National Bank *v.* Commonwealth (9 Wallace, at page 353), the mode commended in that case was the one "adopted for collecting the tax on *dividends* and on the *income* arising from bonds of corporations."

It is, perhaps, needless to multiply authorities on this point.

In Davidson *v.* New Orleans (96 U. S., 97, 1877) the Court held that—

"It is 'due process of law' within the meaning of the Constitution when the statute requires that the fixing of a tax or assessment before it becomes effectual must be submitted to a court of justice, *with notice to the owners* of the property, all of whom have their right to appear and contest the assessment."

In the same case and in McMillen *v.* Anderson (95 U. S., 37), the Court held that—

"'Due process of law' does not in all cases require a resort to a court of justice to assert the rights of the public against the individual or to impose burdens upon his property for the public use."

Again:

"The assessment of taxes belongs to the public agents, and therefore is always left to their guidance, under an expectation, not often disappointed, that they will act faithfully and fairly.

"*Notice to the tax-payers as a duty is cast by the law upon them and opportunity for correcting errors afforded.*"
Phila. *v.* Miller, 49 Pa., 450.

In Stuart *v.* Palmer (74 N. Y., 188) Mr. Justice Earl, of the New York court of appeals, expressed the law in these words:

"It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.

"It matters not upon the question of the constitutionality of such law that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done. The legislature may prescribe the *kind of notice* and the mode in which it shall be given, but it cannot dispense with all notice."

McMahon *v.* Palmer (102 N.Y., 178, 1886) decided that where the tax was levied on national bank shares and the owner had *full notice* of the proceedings and opportunity to question their correctness he was estopped from raising any question affecting their regularity, or that the tax was not levied by "due process of law."

The case of Albany City National Bank *v.* Maher (19 Blatchf., 175), reviewed again in 20 Blatchf., 342, avoided an assessment on the shares of stock of a national bank and held that it could not be enforced, because "the shareholders were *deprived of notice*, and thereby lost the opportunity to be relieved in whole or in part from the payment of the tax."

See 20 Blatchf., at page 342, Wallace, J. (U. S. C. C.).

It is true that in this first case the stockholders were entitled to notice under the statute, but if they had not been and the assessment had been made in conformity with the statute the second case in 20 Blatchf., 342, certainly recog-

nizes the fact that the Constitution vouchsafes notice to them, and that the curative statute could not omit it, because the original act could not omit it. The legislature has a right to legalize what it could previously have ordered.

Donley *v.* Pittsburgh, 147 Pa., 348.
Bingaman *v.* Pittsburgh, 147 Pa., 353.

The presence of notice in the statute is a matter of constitutional right where the assessor acts judicially.

Says Cooley on Taxation, pp. 265, 266, quoting C. J. Agnew in Phil. *v.* Miller, *supra:*

"Is the right to be heard in tax cases a right that is indefeasible? We should say that *notice of proceedings in such cases and an opportunity* for a hearing of some description were matters of constitutional right.

"It has been customary to provide for them as part of what is 'due process of law' for these cases, and it is not to be assumed that constitutional provisions carefully framed for the protection of property were intended, or could be construed, to sanction legislation under which officers might secretly assess one for any amount in their discretion without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed by taxing officers that it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner."

Said the supreme court of California in People *v.* Pittsburg R. Co., 67 California, 625 (1885):

"It is not within the power of the legislature to provide for arbitrary assessments to be made without notice or opportunity to appear before a board of equalization to have the assessment equalized or discharged. Such attempt to make an assessment would not constitute due process of

law. It is violative both of the Constitution and of the 14th amendment to the Constitution of the United States."

See Welty on Assessments, section 4 and note.

To the same effect is the language of Mulligan *v.* Smith, 8 Pac. Coast Law J., 499 :

"The legislature has no power to take away any man's property nor can it authorize its agents to do so without first providing for personal notice to be given to him and for a full opportunity of time, place, and tribunal to be heard in defense of his rights.

"This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

But it may be said that the return to the auditor general by the bank required in the act of 1891, section 7, of a statement of the number of its shares and actual value is the equivalent of "notice" without subsequent provisions as to notice and a hearing.

The remarks of Mr. Justice Field in the Railroad tax cases (13 Fed. Rep., page 750) are in point as to this question :

"The presentation to the State board by the corporation," says he, "of a statement of its property and of its value which it is required to furnish is not the equivalent to a notice of the assessment made and of an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be then heard."

Continuing on page 752, the Court say, in the discussion of the question of "notice:"

"Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the *owner* is allowed a reasonable opportunity at time and place to be designated to be heard respecting the correctness of the assessment and to show any errors in the valuation committed by the officers. Notice to him will be sufficient if the time and place of hearing be designated by statute; but whatever the character of proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceedings must provide for some kind of notice and offer to the owner an opportunity to be heard, or the proceedings will want the essential ingredients of due process of law.

"Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceedings."

8 Sawyer, 274; 13 Fed. Rep., 752.

These positions were reaffirmed by the same judge in Co. of Santa Clara *v.* So. Pac. R. R. Co. (18 Fed. Rep., 385).

Our positions on this phase of the case are briefly these:

1. The State has a right to collect the tax, if "rightly laid," from the bank.

National Bank *v.* Com., 9 Wall., 353.

2. The tax is "rightly laid" when the statute fixes the valuation, as, for example, an invariable one at par, and the rate, without any provision for notice to the shareholder, because the valuation is not then a judicial act calling for evidence. The tax is specific, not *ad valorem*.

Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S., 237.
Com. *v.* Del. Div. Canal Co., 123 Pa., 608.

3. The State has not the right to collect a tax from the corporation on the shares according to their value *as the property of the shareholder*, without notice to the shareholder, where the statute does not ascertain the exact amount of the tax and where there is no fund in the hands of the corporation belonging to the shareholder, as, for example, dividends out of which the corporation may recoup itself.

Houston *v.* New Orleans, 119 U. S., 265.
Hagar *v.* Reclamation District, 111 U. S., 701.

4. Where the valuation is to be ascertained as a judicial act by the assessing officer and a tax imposed "according to the value of the property," notice of some kind to the property-owner must be provided in the statute.

Hagar *v.* Reclamation District, 111 U. S., 701.
Com. *v.* Lehigh V. R. R. Co., 104 Pa. St., 102.
Com. *v.* Lehigh Val. R. R. Co., 139 Pa. St., 456.

The fallacy of Judge Simonton's position on the subject of "notice" is that he decided the present case (168 Pa., 309) on the authority of cases where the tax was either a tax on the *capital stock of the corporation* as the property of the corporation, and the corporation had a right to appeal, or where the tax was a *specific* tax on the property of the individual owners and no notice was required, because the statute itself was notice of the amount of the tax. It was *specific* taxes, as Mr. Justice Clark stated in Com. *v.* Lehigh Valley R. R. Co. (129 Pa., 455), that had been levied and collected in Pennsylvania for more than half a century without provision for notice to shareholders, not *ad valorem* taxes on the shares as the personal property of the shareholders.

So the tax in every case cited and relied on by the learned counsel for the defendants (Commonwealth *v.* Del. & Hudson Canal Co., 150 Pa., 249; Com. *v.* Del. Div. Canal Co., 123 Pa., 625; Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S., 239) was a specific and not an *ad valorem* tax.

Judge Simonton's answer to these positions is:

1. That the present tax is, in principle, assessed as a tax on the capital stock of the corporation; that the corporation is considered, for the purpose of taxation, the representative of the shareholder.

The reply to this is that a tax on the capital stock is essentially a different thing from a tax on the shares of stock "as the personal property of the shareholders." The property of the shareholders in their shares and the property of the corporation in its capital stock are distinct property interests, and where there is the legislative intent clearly expressed they both may be taxed.

Van Allen *v.* Assessors, 3 Wallace, 573.
Delaware railroad tax, 18 Wall., 206.
Farrington *v.* Tennessee, 9 U. S., 679.

The corporation, for all the purposes of taxation, is no more the representative of the shareholder than the shareholder is the representative of the corporation.

Section 5219 of the Revised Statutes of the United States authorizes a tax on the shares of stock as the personal property of the shareholders, not a tax on the capital stock as the property of the corporation.

Notice to the shareholder of a valuation of his share of stock could, under no circumstances, we think, be notice to the corporation of a tax on its capital stock. How, then, can the converse of this proposition be true, that the corporation is the representative of the shareholder where the tax is on the shares and the shareholder has a constitutional right to notice.

2. Judge Simonton declares further—

That "the corporation and the shareholders, as well as the capital stock and shares of stock, are practically the

same," and that for that reason notice to the corporation is to all intents and purposes notice to the shareholders.

The doctrine in the Federal courts as to this identity of property and persons is very different, as we have seen, and it still remains to be declared by the Supreme Court of the United States or any other Federal court that the corporation and the shareholders, as well as the capital stock and shares of stock, are practically the same, and that notice to the corporation of a valuation of the *shareholders' shares of stock* and of a tax laid thereon is notice to the shareholder.

If the position of Judge Simonton be affirmed in this particular, we must carry it to its legitimate and logical result, and hold, as a corollary, that where the tax is laid on the shares of stock the shareholder is entitled to the same deductions as the corporation would be entitled to if the tax were laid on the capital stock, since the two kinds of property are to be regarded as the same.

The Supreme Court of the United States, in Van Allen *v.* Assessors (3 Wallace, 573), held that the stockholders were not entitled to such deductions, however, because the capital stock and shares of stock, as the personal property of the shareholders, are essentially different and distinct kinds of property; and

That a tax on capital is not equivalent to a tax on shares.

Bradley *v.* The People, 4 Wallace, 459.

3. Judge Simonton's third proposition is that a corporation is not entitled to notice before the settlement of a tax on its capital stock, but that a suit brought for the amount thereof is sufficient notice, because the corporation has the right to defend the suit, and that by analogy the same thing is true of a tax on the shares as the property of the shareholders. Such is unquestionably the law, because the corporation thus taxed on its own property, the capital stock,

has then access to the courts by appeal and the opportunity to test the valuation first and by defending a suit for the tax afterward, but no such opportunity is afforded the shareholder in a national bank under the Pennsylvania system. No tax is assessed against him. The State simply does not recognize him.

The Supreme Court of the United States lays down the principle in Hagar *v.* Reclamation District, 111 U. S., 701, when they say:

"A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th amendment of the Constitution which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined or *in subsequent proceedings for its collection.*"

See also doctrine laid down and cases cited in Scott *v.* City of Toledo, 36 Fed. Rep., at page 397.

4. Judge Simonton adds that the law evidently presumes that the officers of the bank will notify their stockholders, for, prescribing in section 7 the duties of the auditor general in assessing the tax, it declares that "it shall be his further duty to hear any stockholder who may desire to be heard on the question of the valuation of the shares as aforesaid."

How far can the law presume in this particular?

Is not the true doctrine as that stated in Stuart *v.* Palmer, 74 N. Y., 188:

"It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.

"It matters not upon the question of the constitutionality of such law that the assessment has in fact been fairly apportioned.

"The constitutional validity of a law is to be tested not

by what has been done under it, but by what may by its authority be done.

"The legislature may *prescribe the kind of notice* and the mode in which it shall be given, but it cannot dispense with all notice."

See also McMahon *v.* Palmer, 102 N. Y., 178.
Palmer *v.* McMahon, 133 U. S., 669.
Albany City National Bank *v.* Maher, 19 Blatchf., 175.
Exchange Bank Tax Cases, 21 Fed. Rep., 99.
Paulsen *v.* Portland, 149 U. S., 30.
Albany City National Bank *v.* Maher, 20 Blatchf., 342.

Where is the time for notification to the shareholder by the cashier of the valuation and assessment?

Not before the return required to be made by the cashier to the auditor general, because it does not follow that the return so made will be adopted.

Not after the valuation by the auditor general, for then the assessment has been made and the tax is due and must be paid by the bank in thirty days.

Has the legislature the right to presume that the officers of the bank, with rare legal insight, will recognize the right which the statute does not give to the shareholder, but the Constitution does, and will make haste to perform a duty which, under the Constitution, ought to be performed either by the statute itself or the State officers?

Supposing one stockholder or a dozen of them were to appeal to the auditor general as to the valuation of their shares, how would their conduct affect the duty of the bank in the premises? The tax is assessed against the bank.

Does not the law rather *presume* that the officers of the bank will not give notice to the shareholders, and does not the perpetuity of this system rest on that presumption?

Imagine a shareholder of the appellant bank, having also shares in a bank which is allowed to pay a tax of only 1 mill on the dollar, receiving from the respective officers of

these banks notices in the one case that a tax of 1 mill is due on the actual value of the shares and in the other case that a tax of 4 mills on their value is due. It would be hard to explain to the average citizen how this could properly be, and the certainty is that the reason why the gross inequalities produced by this system have not been called to the attention of the courts before is that the shareholders have not had notice of it.

The shareholder, without notice, cannot appeal to the auditor general, because he does not know when his period for appeal begins nor when it ends, nor what the valuation of his property may be.

The correct procedure, where the value and rate are not fixed by statute (as in National Bank *v.* Com., 9 Wall., 353), would be one in which the shareholder would have notice, by the statute or otherwise, afforded him of the valuation, of time and place when and where he may appear, and on his failure then to show cause why the valuation is not correct, then, and only then, can the tax lawfully be collected from the bank.

Instead of this, what does the Pennsylvania statute decree?

That the cashier, within thirty days after the assessment by the auditor general, shall collect the tax from the shareholder on a valuation fixed without notice to the shareholder and pay the same into the State treasury under a penalty of 50 per cent.

Suppose the shareholder should appear before the auditor general, would the correction obtained affect only his share or the entire settlement against the bank?

And how collect? Is the cashier's duty to sue the shareholder; if so, in his own name, the name of the bank, or of the State? What remedy has the cashier if the shareholder will not pay? Must he sue and conclude his suit in thirty days?

How can the cashier enforce the claim? The cashier's

right against the shareholder only lasts for thirty days. After that the State drops the shareholder without providing that he shall have any notice as to the assessment, and proceeds against the bank, and no legal remedy is provided against the shareholder. The tax becomes a lien on the real and personal property and franchises of the bank.

The collection of the tax by the cashier *from the shareholder* and turning it into the State treasury within thirty days is a manifest impossibility. In reality no shareholder ever hears anything about the tax, for the cashier simply is compelled to pay it out of the funds of the bank. If the cashiers actually undertook to obey the law and collect in thirty days the tax from the hundreds of shareholders of banks like the appellant, the system would unquestionably, in the language of National Bank *v.* Commonwealth, in 9 Wallace, 353, "impair the usefulness or the capability of the banks to serve the Government," for the cashiers would have found a new and absorbing occupation. Without warrant of law, therefore, this act compels them simply to appropriate the assets of the bank to pay the debts of the shareholders assessed against the bank, the amount of which debt has not been ascertained by due process of law.

As to the Commonwealth's contention that no shareholder is complaining about the want of notice and the defendant company is not in a position to raise the question of notice for him, the decision of Wallace, J., of the United States circuit court, in Albany City Nat'l Bank *v.* Maher, 20 Blatchf., 341 (1882), is in point in a case where the assessment of shares of a national bank was declared to be void, "because the persons subjected to it were deprived of notice, and thereby lost the opportunity to be relieved, in whole or in part, of the payment of the tax." The appellant bank is liable to suits by the shareholders if it pays the tax.

In the above case the court say:

"It may be that the tax assessed against the shareholders is no more onerous than they were required to bear, but this

fact does not affect the question of *legislative power*, and cannot give validity to the act. * * *

"It is urged as a reason for denying the relief claimed that the proof failed to show that the shareholders have any intention to institute suits against the complainant if it pays the tax or withholds their dividends. It suffices, however, that they have the right to sue the bank. The complainant is placed in a position where it is subjected to the contingency of a multiplicity of suits by the several shareholders, on the one hand, if it recognizes the validity of the tax and withholds the dividends, and by the city authorities, on the other hand, if it refuses to do so."

The following cases also recognize the duty of the bank to resist payment of an illegal tax on its shares:

Bank *v.* Paducah, 2 Flippin, 61 (1877).
Bank *v.* Newark, 40 N. J. L., 558 (1878).
Tappan *v.* Bank, 19 Wall., 490 (1873).
Pelton *v.* Bank, 101 U. S., 143 (1879).
Cummings *v.* Bank, 101 U. S., 153 (1879).

Nor is it true that the Pennsylvania system of taxing shares of stock in national banks has been adopted generally by other States of the Union. No other State, so far as we have been able to ascertain, has adopted it, and Pennsylvania has had it only since 1889.

In New York the tax is collected directly from the owner, and is assessed against him, and he has the opportunity of obtaining notice of the assessment and an opportunity to resist the payment of the tax.

Palmer *v.* McMahon, 133 U. S., 660.

In Connecticut the State tax is assessed against and collected from the shareholder.

See Gen. Statutes of Connecticut, section 3836.

In Kansas (paragraph 6868) the General Statutes of 1889 undertook to enforce a system somewhat similar to the Penn-

sylvania system. The supreme court of Kansas in First National Bank of Leonti *v.* Fisher (45 Kans., 726; 1891) declared the assessment void because in violation of section 5219 of the Revised Statutes of the United States.

In Illinois (see Starr & Curtis's Annotated Statutes, vol. 2, p. 2041, paragraph 37) the tax is entered in the lists against the individual owners and the bank is required to retain enough out of the dividends to pay the tax until it has been made to appear that the tax has been paid, thus making the case come within the principle of Houston *v.* New Orleans, 119 U. S., 701.

In Iowa (McClain's Annotated Code of Iowa, sections 1297–'8) the tax is assessed against the shareholder, being included in the tax on his personal property, and each banking association is liable to pay the same as the agent of each of its shareholders, and the association is directed to retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares. Under this law it is held by the supreme court of Iowa that the bank is not absolutely liable for the taxes upon the shares, but to render it liable it must be shown that it has or has had dividends or other money or property belonging to the delinquent stockholders since notice of the assessment of the tax.

Hershire *v.* First National Bank, 35 Iowa, 272.

In Maine (Rev. Stat., 1883, p. 133, ch. 6, sections 30, 31, 32) the tax is assessed against the shareholder, and is a lien on his shares, which may be sold for the tax. After notice by the taxing officer to the cashier of the bank, the latter shall pay no dividend to the shareholder until the tax is paid.

In Michigan (Howell's Annotated Statutes, vol. 1, p. 1267, sec. 11, par. 3) "all shares in bank shall be assessed to their owners in the town where the bank is located."

In Mississippi (Annotated Code of Mississippi, sec. 3764)

the shares are taxed to the owner or holder on the basis of a report made by the bank, and the owner has opportunity to be heard in defending a suit for the tax.

In Georgia (Code 1882, sec. 815, p. 186) if the cashier does not pay the tax assessed against the individual owner, the tax-collector is authorized to sell the shares of stock against which the tax is assessed.

In Kentucky (2 Rev. Statutes, ch. 83, sec. 1, art. 2, p. 239) the section is entitled "*Specific* taxation on real and personal estate," and is as follows:

"On bank stock or stock in any moneyed corporation of loan or discount, 50 cents on each share thereof equal to $100 of stock therein owned by individuals, corporations or societies"—the tax to be paid by the cashier of the bank.

See Com. *v.* First Nat'l Bank of Louisville, 4 Bush, 98; 1868.

This is the case that was affirmed by the Supreme Court of the United States in 9 Wallace, 353.

The tax was specific, and the system applied to both State and national banks. Where the tax was *ad valorem* and payable irrespective of dividends, however, as in the case of New Orleans *v.* Houston (118 U. S.), the Supreme Court of the United States said, with reference to the Louisiana statute, that it really imposed a tax on the capital stock and was uncollectible. In the Kentucky system the tax was collectible from non-resident owners of national and State banks alike. In the Pennsylvania system no method is provided by which the auditor general may collect the tax from a non-resident shareholder of a State bank, but it is collectible in the case of non-resident shareholders of a national bank.

In Massachusetts (Public Stat. Mass., ch. 13, sec. 8, p. 131, ed. 1882) the shares of both State and national banks are assessed to the owners of the shares. The owners have the same means of notice as in the case of their other personal

property. The bank is then liable for the tax, and is given a lien on all the shares of the owner in the bank and on all right and property of the shareholders in the corporate property for the payment of said taxes. The tax is in every case assessed against the owner by name and not *in solido* against the bank.

In Vermont (Vermont Statutes of 1894, sections 378, 379, and 380) the bank cashiers are required to furnish a list of stockholders to the taxing officers, who then include the shares in the list of the owner's personal property and assess the tax against the shareholder by name in the town where he resides.

In the case of non-resident shareholders the tax is assessed against them in the town where the bank is located, and in such case the bank pays the tax and holds the stock and dividends of the non-resident shareholder as security for such payments, and the bank may, under the law, deduct the amount from any dividends payable to such shareholder.

In Rhode Island (Public Statutes of Rhode Island, ch. 42, sections 5, 6, 9, 12, ed. 1882, p. 124) the bank is required to furnish to the assessors a list of the shareholders who are non-residents, and the tax remains a lien on these shares, the bank being forbidden to pay dividends or permit transfers as to these shares of non-residents until the tax is paid, after having received notice of such assessment, the tax being paid by the shareholder.

As to all resident and non-resident shareholders alike the tax is assessed directly against and collected from the shareholders.

In New Jersey (Revision of Statutes of New Jersey, 1877, pp. 1156 and 1161, P. L., 1869, p. 1149) the tax is assessed against the owner in the township where he resides.

In Maryland (Public Gen. Laws of Md., vol. 1, art. 81, section 141, p. 1256) the tax is assessed against and collected from the shareholders except where they are non-resident,

in which case the tax on the shares is collected from the bank, which is directed to charge the said tax when paid against the account of the non-resident shareholder.

In Ohio (Rev. Statutes of Ohio, vol. 1, sections 2764, 2769, 2839, and 2840) the tax is assessed against the shareholders and the bank forbidden to transfer the shares or pay dividends thereon until the tax is paid by the shareholder.

The bank, under section 2765, is required to make a return of the list of the shareholders, number of shares held by each, and the par value of each share.

The bank may, if it chooses, pay the tax assessed against its shareholders and deduct the same from dividends payable to such shareholders.

In construing this statute the supreme court of Ohio held that there is no authority in the statute or under the law of the United States for listing and valuing the shares of a national bank in the aggregate on the tax-list in the name of the bank.

See Miller *v.* First National Bank, 46 Ohio St., 424.

From an examination of the laws of a large number of the States, it therefore appears that only in the case of two was the tax on national bank shares assessed directly against the banks.

Those two States are Kentucky and Kansas.

In Kansas the system closely resembled the Pennsylvania system, the tax being assessed *in solido* against the bank.

The supreme court of Kansas held that this system violated section 5219 of the Revised Statutes of the United States, and was unconstitutional.

In Kentucky the tax was a *specific* tax on the shares, and stockholders could have no concern with the amount thereof, which could not vary, since it was fixed by statute.

In Massachusetts the tax is assessed against the shareholders by name, like the tax on his other personal prop-

erty. When paid by the bank, the bank is given a lien on the shares and property of the shareholders.

This state of facts bears out our declaration that the present tax is not in reality assessed as a tax on shares, but as a tax on capital stock.

The cases cited by the defendant, holding that "personal notice to the shareholder is not necessary," have no reference to a tax on shares of shareholders whatever.

Davis *v.* Los Angeles, 86 Cal., 37, and Happy *v.* Mosher, 48 N. Y., 313, both hold the statutes under which they arise constitutional, because reasonable notice is given to the property-owner. The one case relates to street improvements, the other to maritime liens.

(*b.*) The act violates the fourteenth amendment as to due process of law, for the further reason that while giving no notice to the shareholders of a national bank or opportunity to be heard, it assures to the owners of shares in State banks a day in court and an opportunity to be heard when the auditor general seeks to collect the tax from them individually, as section 6 of the act of 1891 requires him to do.

Mr. Justice Bradley, in Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S., at page 239, says:

"The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed *according to the customary forms* and *established usages or in subordination to principles which underlie them.*"

Is the process of taxation under the Pennsylvania system executed according to the customary forms or established usages or in subordination to the principles which underlie them? The tax system of Pennsylvania contemplates as to most of its corporations the levy of a tax on the capital stock as the property of the corporation.

When such a tax is levied the rights of the corporations at every step are carefully guarded with provisions for notice, appeals, and opportunity to defend the payment of the tax when suit is brought. In the case of State banks and savings institutions the tax is on the shares, and while the proceeding for ascertaining the amount of the tax is the same as in the case of national banks, the tax is collected from the shareholders against whom, as individuals, suit must be brought and judgment obtained, and who therefore have their day in court, an opportunity to appeal, and an opportunity to defend.

In the case of national banks, however, all the machinery for the assessment and collection of a tax on capital stock is brought into requisition for the purpose of collecting what purports to be a tax on shares of stock, except that no opportunity to appeal or defend is given to the shareholders.

Customary forms and established usages are therefore against this particular system of taxation as applied to the shares of the shareholders in national banks.

The supreme court of Pennsylvania, in Markoe *v.* Hartfrant, 15 Am. Law Reg., 487 (O. S.), in 1867 held a law unconstitutional which required the cashier to *retain* a State tax on the shares of a national bank and pay it into the State treasury.

The whole revenue system of Pennsylvania has nothing analogous to the present system in taxing other personal property of individuals.

The other States of the Union, as we have seen, have no such systems as applied to this species of property.

The objectionable part of this present system as to the shares of national banks, after being destroyed in 1867 by the supreme court of Pennsylvania in Markoe *v.* Hartfrant, 15 Am. Law Reg., 487, was renewed in a more objectionable form again for the first time by the revenue act of 1889, as will appear by an "examination of the successive" revenue acts, to wit:

1. The act of February 23, 1866, P. L., 82.

2. The act of April 12, 1867, P. L., 74.

3. The act of April 2, 1868, P. L., 55.

4. The act of December 22, 1869 (P. L., 1870), page 1373.

5. The act of March 31, 1870, P. L., 42.

6. The act of June 7, 1879, P. L., 121.

7. The act of June 10, 1881, P. L., 99.

8. The act of June 30, 1885, P. L., 194.

9. The act of June 1, 1889, sections 25, 26, and 31, P. L., 433, 434, and 437.

10. The act of June 8, 1891, sections 6 and 7.

In all these acts that were not declared unconstitutional down to the act of 1889 the tax was collected from the shareholder, who had an opportunity to resist payment and defend the suit.

We think, therefore, that the objectionable features of this system are neither supported by customary forms nor established usages, nor the constitutional principles that underlie them.

On the contrary, customary forms, established usages, and underlying principles seem to be all against the system.

(*c.*) The lack of uniformity and of the inequality resulting from said system of taxation of shares of stock of national banks further violates the XIV amendment to the Constitution of the United States, in this: that there is denied to the shareholders of stock of national banks the "equal protection of the laws."

It is apparent from the facts of the case that by allowing all national banks to pay 8 mills on the *par* value of their shares of stock and requiring those which do not elect to pay that amount to pay 4 mills on the *actual* value of their shares enormous inequalities are produced. For example, one bank in immediate competition with the plaintiff is allowed to pay at the rate of about 1.12 mills on the actual value of its shares, fifty-five other banks, representing nearly $40,000,000 of moneyed capital, are allowed to pay at the rate of less than 4 mills, and over $9,000,000 worth of such stock in national banks of Pittsburgh is allowed to pay an average rate of a little over 2 mills on the actual value.

About 60 per cent. of all shares of stock of State banks in Pittsburgh was enabled to pay in 1895 less than 4 mills on the actual value of their shares by being allowed to pay 8 mills on the par value, as shown by the official reports of the commissioner of banking and auditor general for 1895.

The plaintiff could also have elected to pay 8 mills on the par value of its shares, but to do so would have required it to pay more than 6 mills on each dollar of the actual or market value, which is at a much greater rate than the State is allowed to tax any national bank shares under section 5219 of the Revised Statutes.

Failing to make this election, the auditor general assesses it at the rate of 4 mills on the actual value.

It was contended in the present case (168 Pa., 309) that such a system of taxation was repugnant to article IX, section 1, of the State constitution, requiring uniformity of taxes upon all subjects of the same class within the territorial limits of the authority levying the tax.

The supreme court of Pennsylvania thought that the tax was uniform, giving as a reason that all banks were offered an inducement in the form of exemption from *local* taxation if they would deal directly with the State in advance

of the action of the *local* authorities, which it was impossible to forecast with accuracy.

As a matter of fact, there is no local tax on the shares of banks in Pennsylvania and has not been in many years.

This fact was brought to the attention of the supreme court, but they declined to alter the ground of their decision, and this decision rests, therefore, on thin air or on the assumption of a fact that has no existence.

The contract for exemption from *local* taxation is based on a consideration that is a nullity because of the non-existence of such *local* taxation. If the 8 mills on the par value of the shares be a State tax at all, the Commonwealth, in one view of the case, simply provides to members of the same class two methods of paying a *State* tax, the alternative method being of immense advantage to certain members, and in some cases amounting to almost an entire exemption, while if embraced by other members of the class it imposes additional burdens. The banks can be by no possibility responsible for the existence of the second class. See Gorley *v.* Bowlby (8 Pa. C. C., 17), holding that there is no law whereby local taxes may be imposed on national bank shares.

In Bell's Gap R. R. Co. *v.* Pennsylvania (134 U. S., 232) Mr. Justice Bradley said:

"We think that we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation. * * *

"Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Government, might be obnoxious to the constitutional prohibition."

Plaintiff's contention is that the present system abounds in clear and hostile discriminations.

That it is a most unusual system of taxation, applied by the State to no other species of property, abounding in the rankest inequalities, and necessarily so, having nothing

parallel to it in the State, and declared unconstitutional wherever applied in other States because of such inequalities, see—

State *v.* Hannibal & St. Joe R. R. Co., 75 Mo., 208.
Life Association *v.* Board of Assessors, 49 Mo., 521.
Louisiana Mfg. Co. *v.* New Orleans, 31 La. Ann., 440.
New Orleans *v.* Fayette Ins. Co., 28 La. Ann., 756.
New Orleans *v.* St. Charles St. R. R. Co., 28 La. Ann., 497.

The Pennsylvania act of 1891 requires certain national banks to pay an *ad valorem* tax at a certain rate and allows other banks to pay a specific tax on the shares at a different rate. We contend that this is within the prohibition of the fourteenth amendment to the Federal Constitution, where the results show great inequalities and discriminations as an absolutely necessary consequence.

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contributions from one which would follow taxation of his property, without reference to a common ratio, would be inconsistent with an equal protection which the amendment requires the State to extend to every person within its jurisdiction."

R. R. Tax Cases, 13 Fed. Rep., 734.

Again, on page 733 of the same case, the court say:

"The fourteenth amendment to the Constitution, declaring that no State shall deny to any person within its jurisdiction the equal protection of the law, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive any one of the equal protection of the laws, and by equal protection of the laws is meant equal security

under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrong, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form or under any pretense are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid.

"It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind similarly situated at different rates; where one may be taxed at 1 per cent. on the value of his property, another at 2 or 5 per cent., or where one may be thus taxed according to his color, because he is white or black or brown or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

Again, at page 735:

"Uniformity of taxation necessarily requires uniformity in the mode of assessment as well as in the rate of taxation."

Said Mr. Justice Sawyer, concurring with Mr. Justice Field, in the same case, at page 760 of 13 Fed. Reporter:

"The property of the corporation is in reality the property of its individual corporators. A State statute depriving a corporation of its property does deprive the individual corporators of their property. These clauses of the 5th and 14th amendments and the similar clauses of the State constitution apply, therefore, to private corporations, not alone because such corporations are 'persons' within the meaning of that word, but also because statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons. In applying and

enforcing these constitutional guarantees corporations cannot be separated from the natural persons who compose them."

In accordance with this line of reasoning, therefore, the Pennsylvania statute would not be more grossly unjust if it were to enact in express terms that a shareholder in a designated bank of Pittsburgh may escape all taxation by paying a tax of 1.12 mills upon each dollar of the actual value of his shares; but a shareholder in the plaintiff bank must pay 4 mills upon each dollar of the actual value of his shares, these two banks being directly in competition with one another.

This system deprives the State of immense revenues. Of eight national banks in Pittsburgh electing to pay 8 mills on the par value of their shares, it appears that if they paid 4 mills on the actual value the State would receive from them $37,710 where now it receives $22,400.

Not to draw invidious comparisons, the results of this system can best be seen in a attempt to apply it to two well-known national banks in the State of New York:

1. The Chemical National Bank of the City of New York:

This bank has a capital stock of.....	$300,000
Surplus fund.....	6,000,000
Undivided profits.....	997,855
Total.....	$7,297,855

Our Pennsylvania system would allow all this wealth to escape all further taxation by the payment of 8 mills upon the value of the shares of stock at par—*i. e.*, $2,400. This would be less than half a mill upon each dollar of the "book" value of the shares—one-fifth of 1 mill on actual value. Taxed by the system applied to the appellant, however, this bank ought to pay a tax of $54,000.

2. The First National Bank of New York—

Has capital stock	$500,000
Surplus and undivided profits.....	7,030,461
Total.....	$7,530,461

This bank, by the Pennsylvania system, would be allowed to pay a tax of $4,000 in commutation of all other taxation—about one-half of 1 mill upon the "book" value of the shares. Taxed by the system applied to this appellant, this bank ought to pay $30,121.84 at the least, assuming that the actual value of the shares does not exceed the "book" value, although, as a matter of fact, it does.

These cases are extreme, but they emphasize what has been said, that a system of taxation that renders such things possible is vicious in the extreme. It violates every principle of equitable taxation, and we believe that equitable taxation, as between members of the same class, was included in the "equal protection of the laws."

The application of the fourteenth amendment to the case at bar may best be summed up in the language of Mr. Justice Field in the *Railroad Tax Cases* (13 F. R., 748):

"As no discrimination and partial legislation imposing unequal burdens upon the property of individuals would be valid under the fourteenth amendment, so no legislation imposing such unequal legislation upon the property of corporations can be maintained."

Again, in County of *Santa Clara v. So. Pac. R. R. Co.* (18 F. R., 399) Mr. Justice Field makes use of the following language:

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the fourteenth amendment. There are undoubtedly and always will be more or less inequality in the operation of all general legislation arising from the different conditions of per-

sons, from their means, business, or positions in life, against which no foresight can guard; but this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequalities, or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be obtainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition."

In *Northern Pacific R. R. Co. v. Walker*, 47 Fed. Rep., 686, the Court say:

"Property of the same kind, in the same condition, and used for the same purpose, must be taxed by a uniform rule, without regard to its ownership.

"The legislature having selected land as a subject for taxation, all lands under the same conditions are subject to be taxed. The law of taxation of lands must operate *equally* and uniformly upon all lands, the condition and use of which are similar. While property may be classified for the purposes of taxation between the subjects of the same class, there must be equality. * * *

"It was not competent for the legislature, under the fourteenth amendment of the Constitution of the United States, to classify the lands in the Territory for purposes of taxation into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed."

Equal protection of the laws implies not only equal accessibility to the courts for the protection or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind.

Ex parte Ah Fong, 3 Sawy., 144.

The banks that elect to pay 8 mills on the par value of their shares into the State treasury for the purpose of purchasing exemption from local taxation ought not thereby to purchase exemption from State taxation. The law sim-

ply neglects to impose any State tax as such upon them, while imposing such a tax on the banks that do not elect to purchase such exemption.

See *Bank v. Wilkesbarre*, 148 Pa., 604.

Does this system of taxation violate the fourteenth amendment?

The question is as to whether there is a discrimination in favor of one against another of the same class.

Home Ins. Co. v. N. Y., 134 U. S., 594.

Grozzia v. Tiernan, 148 U. S., 657.

Pacific Express Co. v. Siebert, 142 U. S., 339.

This discrimination may be apparent on the face of the statute in the legislative intent or in the results produced.

Davenport Bank v. City of Davenport, 123 U. S., 83.

Where is the difference in the state of facts developed in the present case between a statute which should enact that certain designated national and State banks shall pay a tax of 1 mill on the dollar of the actual value of their shares, certain others at 2 mills, certain others at 3 mills, and the remainder at 4 mills, or that the shareholders of the respective banks should do so?

Surely the fourteenth amendment would not permit a legislative enactment which, in direct terms, should so enact.

Why should it permit one which, under the form of general legislation, necessarily produces the same results?

The supreme court of Pennsylvania (168 Pa., 320), in this case holds that the species of classification of banks whereby they fall into two classes in the payment of these taxes does not violate article IX, section 1, of the State constitution, requiring uniformity as between members of the same class. "The rate," they say, "is uniform

for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy."

As has been seen, there is no action of the local authorities which the banks are called on to forecast. For many years there has been no taxation by local authorities in Pennsylvania of bank shares and no legislation authorizing it.

The species of classification approved by the supreme court of Pennsylvania in the above case, we maintain, is in violation of the fourteenth amendment.

The Supreme Court of the United States in a recently decided case (Gulf, Colorado & Santa Fe R. R. Co. *v.* Ellis, 165 U. S., 155, decided Jan. 18, 1897), says:

"It is said that it is not within the scope of the fourteenth amendment to withhold from the States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection.

"While as a general proposition this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily.

"The State may not say that all white men shall be subjected to the attorney's fees of parties successfully suing them and all black men not.

"It may not say that all men beyond a certain age shall be alone thus subjected or all men possessed of a certain wealth.

"These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * *

"Classification for legislative purposes must have some reasonable basis on which to stand."

The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations.

Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair.

Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.

In Van Zant *v.* Waddel, 2 Yerger, 260, 270, Catron, J. (afterward Mr. Justice Catron, of this court), speaking for the supreme court of Tennessee, declared:

"Every *partial* or private law which directly proposes to destroy or *affect* individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.

"Were this otherwise odious individual and corporate bodies would be governed by one rule and the mass of the community who made the law by another.

"In Dibrell *v.* Morris' heirs, supreme court of Tennessee, 15 S. W. Rep., 87, 95, Baxter, special judge, reviewing at some length cases of classification, closes the review with these words:

"'We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.'"

* * *

The first official action of this nation declared the foundation of government in these words:

"'We hold these truths to be self-evident that all men are created equal; that they are endowed by the Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' * * *

"No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended

to secure that equality of rights which is the foundation of free government. * * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the inequality clause of the fourteenth amendment, and that in all cases it must appear not only that a *classification has been made, but also that it is one based upon some reasonable ground*—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

Again:

* * * "Constitutional provisions for the security of person and property should be liberally construed.

"A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

"It is the duty of courts to be watchful for the constitutional rights of the citizens against any stealthy encroachment thereon. Their motto should be *obsta principiis*.

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clause of the fourteenth amendment a mere rope of sand in no manner restraining the State action.

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this."

No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews speaking for this Court, in *Lick Wo v. Hopkins*, 118 U. S., 356, 369:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

We think that the declaration of the supreme court of Pennsylvania that the banks are themselves responsible for the existence of the second class; that they are all invited to deal directly with the State; that if they do not, it is fair to assume that their action is guided by what they believe to be their own pecuniary interest; that of a want of uniformity, which is the result of their own deliberate action, they certainly ought not to complain; also fails to regard the inhibition of the fourteenth amendment. There is no question of dealing directly or indirectly with the State; all must deal directly with the State. The pecuniary interests of the banks are not, or ought not to be, involved; but the system of taxation allows a multitude of shareholders of the richest and most prosperous banks to be relieved in large measure from the burden of taxation. The banks ought to be interested only as the trustees of their shareholders. They have no other pecuniary interest. For the advantage of their shareholders they choose the least burdensome of two diverse and distinct systems of taxation. When they have done this, it is found that many bear a very heavy burden and others a very light one. There is no equality of choice.

The court recognizes, for the purpose of taxation, a system of subclassification among members of the same class, by which system it is elective with the members of the class to which subclass they shall belong.

This position is open to most grave objections.

(*a*) That it is not competent for the legislature to delegate to the tax-paying subject the power to classify itself for purposes of taxation. Classification is a legislative act.

1 Desty on Taxation, 96.
Roup's case, 81 Pa., 211.
Banger's appeal, 109 Pa., 79.
Com. v. Del. Div. Canal Co., 123 Pa., 494.

A legislative power cannot be delegated.

O'Neil v. Am. Fire Ins. Co., 35 W. N. C., 513.
Cooley on Const. Limitations (6th ed.), 137.
Parker v. Com., 6 Pa., 507.
State v. Commissioners, 37 N. J. L., 12.
State v. Young, 29 Minn., 474.

(*b*) That such a classification is not based upon any possible or ascertainable difference between the members of the two classes "upon the want of adaptability to the same methods of taxation or upon impracticability of applying to the various subjects the same methods, so as to produce a just and reasonably uniform result, or upon well-grounded considerations of public policy."

Com. v. Del. Div. Can. Co., 123 Pa., 623.

(*c*) That if national banks can be divided into two classes for purposes of taxation, depending upon the election of each bank as to which class each shall belong to, they can be divided into an indefinite number—as many as there are members of the class—and no possible form of taxation is so monstrous as to be within the constitutional inhibition of the fourteenth amendment.

While the system of classification above indicated may satisfy article IX, section 1, of the constitution of Pennsylvania, since the supreme court of the State so declares, we do not believe that it satisfies the provisions of the fourteenth amendment of the Federal Constitution, vouchsafing to all the equal protection of the laws.

The device by which this species of classification of banks is effected is itself in violation of the constitution of Pennsylvania (art. IX, sec. 3), which declares:

"The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

By this system of taxing banks or bank shares, as at present construed in Pennsylvania, the State, in effect, for a stipulated consideration enters into a contract with the banks to suspend for the time being the right to tax a certain species of corporate property as it taxes other similar property.

By its terms the exemption is only to be from local taxation.

But the act is construed to exempt from State taxation as well. At any rate, the act neglects to provide any method of assessing a State tax as such against those banks that enter into the contract for exemption from local taxation.

Article IX, section 3, forbids the surrender or suspension for a long or short time, in consideration of a large sum of money or a small sum, of the right to tax corporate property by any contract to which the State is a party. The State is disabled and incapacitated from entering into such a contract. It would not make any difference if a bank were to pay $100 per share for exemption from local taxation or all taxation for a single year. The State is absolutely forbidden by the constitution to accept it.

In the case of *Mott v. Pennsylvania Railroad* (30 Pa., 38) the exemption from taxation was perpetual and the price to be paid a very large sum of money.

The supreme court of Pennsylvania, before the present constitution of 1874, declared the legislation allowing such a contract unconstitutional and void.

The statutory contract, whereby a corporation may purchase exemption from local taxtion from year to year for its shareholders by paying into the State treasury 8 mills on each share, is a piece of legislation of the same variety.

It is forbidden by the constitution, and is void and an absolute nullity.

Void though it be, the State holds it as a shield between those who enter into the contract and its duty under the fourteenth amendment to treat all alike.

Those who purchase exemption from local taxation therefore purchase exemption from what doesn't exist by a contract which the State has no power to make, and assume that they are protected from State taxation which, on its part, the State fails to impose, while imposing it on all others of the same class.

Does not the fourteenth amendment forbid?

It seems to us that every proper consideration of public policy is against the system.

It robs the State every year of probably $75,000 in revenue in order to enable the most prosperous banks to retain that money in their swollen surplus funds.

A uniform system, taxing all alike, would add that much to the annual revenues. Under the present system every year more and more of these powerful corporations, as they prosper, come into the class where the rate of tax which they pay on the actual values of their shares varies inversely with their prosperity. Some one else bears the burden which they ought to carry.

The State does not keep the word of promise to the sense.

Does the law afford no remedy?

From all of the foregoing we submit that it is conclusively established that the judgment herein against plaintiff in error cannot be sustained, and that the same should be *reversed.*

Respectfully submitted by—

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JAMES H. McKENNEY,
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167-461

Supreme Court of the United States.

October Term, 1896.

No. 301.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK OF PITTSBURG, PENNA.,

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In Error to the Supreme Court of the State of Pennsylvania.

Brief for Commonwealth of Pennsylvania.

JOHN P. ELKIN,
Deputy Attorney General.
HENRY C. McCORMICK,
Attorney General.

Supreme Court of the United States.

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Plaintiff in Error,

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In Error to the Supreme Court of the State of Pennsylvania.

ARGUMENT FOR COMMONWEALTH OF PENNSYLVANIA.

This case arises on an appeal taken under the provisions of the act of 1811 relating to public accounts, from a settlement by the Auditor General and State Treasurer of the Commonwealth of Pennsylvania against The Merchants' and Manufacturers' National Bank of Pittsburg, Pennsylvania, the plaintiff in error, for tax on the shares of its capital stock for the tax year A. D. 1893. The tax was regularly and properly settled against the plaintiff in error under the provisions of the seventh section of the act of June 8th, A. D. 1891 (P. L. 242). The plaintiff in error does not contend that there was any irregularity in the making of the settlement against it, but it has been earnestly pressed in all of the courts below that the law under which the tax was levied is unconstitutional. It undertakes to support this contention by insisting upon three legal propositions which we shall en-

deavor to answer in the order set out in the appellant's paper book.

I.

The Constitution of Pennsylvania, Article IX, Section 1, provides that

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

The brief of the plaintiff in error, from pages 12 to 39, inclusive, argues with great ability the question as to whether the tax imposed upon the shares of stock of national banks contravenes the provision of the Constitution hereinbefore set out. The defendant in error, however, insists that this argument was very ably and properly presented to the Court of Common Pleas of Dauphin county on the appeal taken from the settlement made by the Auditor General and State Treasurer and afterwards in the Supreme Court of Pennsylvania, in each of which tribunals this exact question was expressly ruled against the contention of the plaintiff in error. The Federal courts do not undertake to review the action of a State court in passing upon the question of the constitutionality of an act of Assembly involving the construction of the Constitution of that State. This principle was clearly recognized and, we submit, conclusively settled, in the case of *Lewis* vs. *Monson, 151 U. S., 545*, wherein Mr. Justice Brewer, at page 549, states the rule in the following language:

"No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a

matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings, except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

"In the case of *Bell's Gap Railroad Co.* vs. *Pennsylvania 134 U. S., at page 236,* Mr. Justice Bradley recognizes the same rule in the following words:

"As to the assessment of the tax of three mills upon the nominal or face value of the bonds, instead of assessing it upon the actual value. This might have been subject to question under the State laws, but the State courts have upheld the assessment as valid. We are to accept it, therefore, as part of the State system of taxation, authorized by its Constitution and laws. Then how does it violate any provision of the Constitution of the United States?"

"The plaintiff in error has argued in the courts of Pennsylvania every question it now undertakes to raise. It has been decided by the Supreme Court of Pennsylvania that the act of 1891 is constitutional. In the case of *Commonwealth* vs. *Merchants' & Manufacturers' National Bank, of Pittsburg, 168 P. S., 309,* the syllabus states the principle therein decided as follows:

"The act of June 8, 1891, P. L. 240, which provides that any bank incorporated by this State or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders and pay into the State Treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued, and that any bank which fails to do so shall be subject to a tax of four mills upon the actual value of all the shares of its capital stock, is not repugnant to Article IX, Section 1 of the Constitution of Pennsylvania, which ordaints that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"The act is not in conflict with the condition upon

which the several States are permitted to tax the shares of stock in national banks, namely:

" 'That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.'

"The act is not in conflict with amendment fourteen of the Constitution of the United States, which ordains that no State shall 'deny to any person within its jurisdiction the equal protection of the law.'

"The act provides sufficient means of notice to the shareholders of the stock upon which the tax is imposed."

Inasmuch, therefore, as the Supreme Court of Pennsylvania has held the act of 1891 to be constitutional, the Federal courts will accept this decision as final, except wherein some question involving the construction of the Federal Constitution is raised.

II.

The contention of the defendant in error is that the provisions of the act of June 8, A. D. 1891, which provide for the taxation of the shares of stock in national banks, does not violate the acts of Congress of 1864 and 1868 regulating the taxation of such shares of stock. The best and, we respectfully submit, the conclusive answer to the second proposition set out in the paper book of the plaintiff in error is that provision of Section 7 of the act of June 8, A. D. 1891 (P. L. 242), which reads as follows:

"That from and after the passage of this act every national bank located within this Commonwealth which shall fail to elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of all the shares of said bank that have been subscribed or issued, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president or cashier, setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the

duty of the Auditor General to assess the same for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of this State, that is to say, at the rate of four mills upon each dollar of the actual value thereof."

It will be noticed that the Legislature was careful to write into the act of Assembly the provision that the shares of stock in national banks should be assessed for taxation "at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State, that is to say, at the rate of four mills upon each dollar of the actual value thereof." The Legislature recognized the rule of taxation laid down in the acts of Congress referred to, and provided that the taxation of the shares of stock should be at the same rate as other moneyed capital in the hands of individual citizens. Individual citizens of Pennsylvania, under the provisions of the taxing statute, pay four mills upon the dollar upon bonds, mortgages and other moneys at interest. The plaintiff in error admits that the rate fixed in the act of Assembly for the taxation of shares of stock in national banks is the same as the rate established for the taxation of moneyed capital in the hands of individual citizens, but it is contended that the result of the imposition of the tax, under the seventh section of the act of 1891, results in a lack of uniformity and that for this reason the statute contravenes the provisions of the acts of Congress.

The answer to this argument is that the lower and Supreme Courts of the State of Pennsylvania have decided that the act of Assembly does not contravene the constitutional provisions providing for uniformity of taxation. The defendant in error, therefore, contends that since the State courts have passed upon the question of uniformity in favor of the claim of the Commonwealth in the case now pending, the plaintiff in error is not in a position to raise the question of uniformity before this court.

Section 6 of the act of June 8, A. D. 1891 (P. L. 240), gives all national banks the right to elect to pay eight mills upon the par value of their capital stock and the election to pay the eight mills upon the par value purchases exemption from all other taxation. It was the intention of this provision of our revenue statute to make an inducement to banks to pay a higher rate upon the par value of their capital stock in order that they might be exempt from all other forms of taxation. It will be observed that they elect to pay a rate twice as high as the rate that is imposed in Section 7. This provision of the act does not contravene the constitutional requirement for uniformity of taxation for the reason that every national bank in the State has the right to elect to pay the eight mills upon the par value of its capital stock. When a bank does so elect to pay eight mills upon the par value of its capital stock it cannot then complain that a higher rate of taxation has been imposed upon it than other moneyed capital in the hands of individual citizens of the State. The law does not impose the eight mills upon the shares of stock in national banks, but it gives the bank the right voluntarily to elect to pay that amount if it so desires. This requirement of the law places the responsibility upon the national bank, and when it voluntarily chooses to pay the eight mills on the par value, it certainly cannot then complain that it is required to pay a higher rate of taxation than other moneyed capital in the hands of individual citizens. If for any reason the bank does not choose to pay the eight mills upon the par value of its capital stock, then the provisions of Section 7 apply and the accounting officers of the Commonwealth levy a tax upon the actual value of the shares of stock at the same rate imposed upon other moneyed capital in the hands of individual citizens.

In the case of *Commonwealth* vs. *Merchants' and Manufacturers' National Bank, 168 P. S., 320,* Mr. Justice

Williams, of the Supreme Court, in passing upon this question, made use of the following language:

"These and many other circumstances result in decided success in some cases, in the swallowing up of earnings, in expenses in others, and in a positive impairment of capital in some others. The law, that operated with practical uniformity of result, at first produces noticeable inequality as the results of differences in location and management begin to develop themselves, until results such as are brought to our attention in this case flow from the application of a uniform rate of taxation to the shares of stock at their par value. The inequalities are due to causes which the Legislature could not be required to foresee or provide against, and for that reason they cannot be charged to the law. But the appellant complains that the law furnishes two modes and rates for taxing the stock of national banks, and denies that this can be constitutionally done. But the State finds it convenient and economical to tax its corporations and collect the taxes through its own proper machinery. To induce the banks to make their returns to the Auditor General and to pay their taxes into the State Treasury the State offers an inducement. It proposes to relieve all the banks from local taxation that elect to pay a certain rate per cent. upon their shares of stock directly into the State Treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent. which they pay at one time and one place.

"Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the State taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent. differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the State. If they do not it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity, which is the result of their own deliberate

action, they certainly ought not to complain. Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain."

A careful review of the act of Assembly and the decisions of the court under the same convinces the defendant in error that the provisions of Sections 6 and 7 of the act of June 8, A. D. 1891, taxing shares of stock in national banks, do not violate the acts of Congress in reference to this subject.

In 1874 this question was construed in the case of *Hepburn* vs. *The School Directors, 23 Wallace, 485*, wherein the Chief Justice, delivering the opinion of the court, said:

"The most important question presented by the assignment of errors is, whether shares of stock in a national bank can be valued for taxation by the State in which the bank is located, at an amount exceeding their par value. It is certain that they cannot be taxed at a greater rate than is assessed upon *other moneyed capital* in the hands of individual citizens of the State. Such is the express provision of the act of Congress."

In this case it was contended that, because certain capital in the hands of individual citizens was exempted from taxation by the State law, therefore the shares of national bank stock could not be taxed. In answer to this position the Chief Justice, at page 485, *supra*, says:

"In support of this claim it is shown that all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation within that borough except for State purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be *other moneyed capital* in the locality than such as is exempt. If there is such moneyed capital as such is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Again in 1885 the question was passed upon in the case of *Boyer* vs. *Boyer, 113 U. S., 689.* The doctrine of that case as stated in the syllabus is as follows:

"While exact uniformity or equality of taxation cannot be expected under any system, capital invested in national bank shares was intended by Congress to be placed upon the same footing of substantial equality in respect of taxation by State authority as the State establishes *for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares* or otherwise." That is otherwise than in the shares of stock of national banks?

Again, in 1887, in the case of the *Mercantile Bank* vs. *New York, 121 U. S., 138,* the question was passed upon by the Supreme Court of the United States and the following rule laid down:

"The term 'moneyed capital,' as used in Rev. Stat., section 5,219, respecting State taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money—as in banking that business is defined in the opinion of the court; but it does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests in capital in securities payable in money."

III.

There remains but a single question for the defendant in error to consider and answer, and it is raised by the third division of the subject set out in the paper book of the plaintiff in error.

Does the act of June 8, 1891, take property without due process of law or deny to its citizens the equal protection of law?

The answer of the ~~plaintiff~~ defendant in error to this proposition is that under the provisions of Section 7 of the act of 1891, taxing shares of stock of national banks, no

person is deprived of property without due process of law. The due process of law is prescribed in the act of Assembly and applies to all members of the class alike. It is the same due process of law which is provided in taxing shares of stock in banks incorporated under our State law. The act of Assembly is the law of the land, and its provisions must be held to provide the due process of law in this case. Judge Cooley, in his work on taxation, at page 48, in speaking on this question, says:

"On the contrary, a legislative act for that purpose; when clearly within the limits of legislative authority, is of itself the law of the land. And an act for levying taxes and providing means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the Legislature. It is, therefore, the law of the land not merely in so far as it lays down a general rule to be observed, *but in all the proceedings and all process which it points out or provides for in order to give the rule full operation.*"

After discussing this whole question and summarizing the conclusions of law under the decisions relating to the same, he states:

"These cases settle very conclusively the construction of the fourteenth amendment, and decide that the Federal courts have no general jurisdiction to prevent oppression under State tax laws, nor to give relief against hardships and inequalities in their workings."

Upon the question of notice and the right of the Legislature to pass a law similar in its provisions to the act of 1891, a study of the case of *Commonwealth* v. *First National Bank*, found in *96 American Decisions, page 287*, is of value. It is there said by Chief Justice Williams, of the Supreme Court of Kentucky:

"As the tax is laid upon the shares, and not upon the capital of the bank, it is really and *bona fide* a tax upon the shareholders; but as many of these are non-residents, and could not be reached by the laying taxes upon their shares of stock, and looking alone to them for pay-

ment, the State laws require the cashiers of the banks to pay this tax upon their shareholders. If there be any provision of the Congressional enactment authorizing these associations to prevent the States requiring of the officers of the association to pay the tax levied upon its shareholders, it has not been pointed out nor seen by us. The great if not sole object of Congress was to secure the national bank associations from a discriminating tax, and not that the tax should be collected in a particular manner."

The case was taken to this court and the opinion will be found reported in *9 Wallace, 361*, where Mr. Justice Miller, delivering the opinion of the court, said, *inter alia:*

"It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax levied upon their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholders contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholders. If the State cannot require of the bank to pay the tax upon the shares of its stock it must be because the Constitution of the United States or some act of Congress forbids it. There is certainly no express provision of the Constitution on the subject."

The case of *New Orleans* vs. *Houston, 119 U. S., 279*, sustains the position of the defendant in error, as will be found by reference to the reasoning of Mr. Justice Matthews therein contained:

"The case differs altogether from that of *United States* vs. *Railroad Co., 17 Wall, 322*, in which it was held that the tax provided for in the 122d section of the Internal Revenue act of 1864, as amended, requiring railroad and other corporations to pay a tax upon inter-

est and dividends payable by them, with the right to deduct the same from the amounts otherwise due to creditors and stockholders, was a tax upon the latter and not upon the corporation, because the corporation was made use of merely as a convenient means of collecting the tax. And it cannot be considered as ultimately a tax upon the shares, as the property of the shareholders, within the principle of the decision in *National Bank* vs. *Commonwealth, 9 Wall, 353.* There the act of Congress expressly distinguished between the taxing of the bank and the taxing of the shareholders on account of their shares, and, as was held in that case, left it open to the State to collect the tax levied on the shares by imposing the duty of collecting it upon the corporation. That, we think, is prohibited in this case by the terms of the contract contained in the charter, which exempts the corporation from the payment of all taxes whatever in excess of the specified annual sum, whether levied on it before or to be paid by it on any account whatever."

Even the case of *County Santa Clara* vs. *S. P. R. R. Co., 19 Federal Reporter, 410,* often relied upon to sustain the doctrine of notice contended for by plaintiff in error, states the rule as follows:

"The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. *As a general rule only statutory notice is given. The State may designate the kind of notice and the manner in which it shall be given.*"

The act of 1891 fixes the time for making the valuation of the shares of national bank stock "on or before the 20th day of June of each year." This is the statutory provision as to the time of which the shareholder must take notice. The valuation is immediately followed by an assessment of the tax by the Auditor General. After the account is settled by the Auditor General and approved by the State Treasurer, as provided by the act of 1811, notice of the tax settlement is mailed to the cashier or president of the bank. All parties in interest have then the right of appeal to the Court of

Common Pleas of Dauphin county for a period of sixty days. It is further provided in the act of 1891 that the shareholders of stock in national banks shall have the right to be heard by the Auditor General on the question of the valuation of their shares of stock. The law presumes that notice to the proper officers of the bank is notice to the shareholders. If, as a matter of fact, the officers of the bank fail to notify each individual shareholder, *laches* cannot be imputed to the Commonwealth, for it has done all that it can do to give the notice.

It has been held in the case of *Commonwealth* vs. *First National Bank*, above cited, that "shares of stock in national banks are liable for the same tax that shares of stock in a bank authorized by State laws are compelled to pay, *and the officers of the national bank may be compelled to pay such tax for their respective shareholders.*" That case was decided by the Supreme Court of Kentucky, in 1868, and it has been accepted by the profession ever since. Many of the States have followed in the trend of that opinion by providing for the collection of the tax assessed upon shares of stock in national banks by the cashiers of such banks. The New England States have very generally adopted this method of taxing and collecting tax from national banking institutions. It has been further held in several jurisdictions that personal notice to the shareholders is not necessary. *Davis* vs. *Los Angeles, 86 California, 37; Happy* vs. *Mosher, 48 N. Y., 313.*

Pennsylvania has followed in the same line in its method of taxing the shares of stock in national banking institutions, and the law of 1891 is based upon this principle. The right of the Legislature to make officers of corporations levy and collect such taxes has been clearly recognized by the Supreme Court in the case of *Commonwealth* vs. *D. & H. Canal Co., 150 P. S., 249*, and in *Commonwealth* vs. *Delaware Division Canal Co., 123 P. S., 625.* Mr. Justice Bradley, in the case of *Bell's Gap R. R. Co.* vs. *Pennsylvania, 134 U. S.*, at page 239, says:

The process of taxation does not require the *same kind of notice* as is required in a suit at law, or even in proceedings for taxing private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to the customary forms and established usages, or in subordination to principles which underlie them."

The learned court below, upon the authority of *Commonwealth* vs. *Fall Brook Coal Co., 156 P. S., 448*, and *Commonwealth* vs. *Lehigh Coal & Navigation Company, 162 P. S., 603*, held that, inasmuch as "it has been decided in recent cases by the Supreme Court that the corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same," notice to the cashier of a bank was notice to the shareholder for the purpose of taxation, under the provisions of the act of 1891.

The defendant in error further contends that no shareholder is complaining about the want of notice, and the plaintiff in error is not in a position to raise the question of notice for him. Indeed, there is no evidence in this case to show that the shareholders did not receive actual notice of the valuation of their shares of stock. In the absence of proof showing that the shareholders did not receive such notice, the fair legal presumption is that they did receive it through the cashier of the bank. The fact that such notice was not given must be first established before any one can take advantage of it. Notice is a personal privilege and the party aggrieved by failure to receive it is the only proper person to raise the question.

It is further contended, however, that this system of taking shares of stock in national banking institutions contravenes Article XIV, Section 1, of the Constitution of the United States, wherein it is provided that no State shall deny to any person within its jurisdiction the equal protection of the law. This position is often relied upon by persons who find fault with the rev-

enue laws of their State. There is nothing in the case at bar that will justify the plaintiff in error in invoking this provision of the Federal Constitution to aid in defeating the revenue system of our State. The position is entirely without merit so far as the present controversy is concerned. When a case between the same parties was before the courts of Pennsylvania, the learned court below rested the answer to this proposition upon the authority of *Bell's Gap R. R.* vs. *Pennsylvania, 134 U. S., 232.* In that case Mr. Justice Bradley, speaking for the court, said:

"With due regard to these considerations, we are clearly of opinion that the method of assessing tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the fourteenth amendment to the Constitution."

See also *Chester City* vs. *Pennsylvania, 134 U. S., 240.*

One of the latest cases before the Supreme Court, involving the construction of this constitutional provision is that of *Jennings* v. *Coal Ridge Improvement & Coal Co., 147 U. S., 147.* This latter case followed the principle announced in the case of *Bell's Gap R. R. Co.* vs. *Commonwealth, supra.*

When the case of *Commonwealth* v. *Merchants' & Manufacturers' National Bank of Pittsburg, 168 P. S., 316,* was before the court below, Simonton, J., in rendering the opinion of that court, in passing upon the question there raised, among other things, says:

"The principle upon which this tax is assessed with respect to notice is the same as that upon which the tax on the capital stock of other corporations is, and has been for half a century, assessed. The settlement is made against the corporation, which is considered for the purpose of taxation the representative of the shareholders. Furthermore, it has been decided in recent cases by the Supreme Court that the corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same: *Com.* v. *Fall Brook Coal Co., 156 Pa., 488; Com.* v. *Lehigh Coal & Nav. Co., 162 Pa.,*

603. This being so, notice to the corporation would seem to be, to all intents and purposes, notice to the shareholders. And it has frequently been held that the corporation is not entitled to notice before the settlement is made, but that the requirement of the act of 1811, in relation to public accounts, that a copy of the account settled shall be mailed to the corporation, with the right of appeal from the settlement during sixty days thereafter, is a sufficient provision for notice; and that, where the copy of the settlement was not actually received, an action brought for the amount of the tax is sufficient notice. And the law evidently presumes that the officers of the bank will notify their stockholders, for, prescribing in Section 7 the duties of the Auditor General in assessing this tax, it declares that 'it shall be his further duty to hear any stockholders who may desire to be heard on the question of the valuation of the shares as aforesaid.' For these reasons we think these objections cannot be sustained."

From the act of Assembly referred to, the decisions of the courts cited and the rules of construction applicable thereto, the defendant in error earnestly contends that the act of Assembly under which the tax is imposed is a valid and constitutional one; that the provisions of the acts of Congress in reference to the taxation of shares of stock in national banks have not been impinged upon, and that no provision of the Federal Constitution is violated in the levying of said tax under the provisions of the act of 1891.

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